82-1110

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., YELLOW FREIGHT SYSTEMS, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS INC., IML FREIGHT INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E.—D.C. INC., CONSOLIDATED COPPERSTATE LINES, GARRETT FREIGHT LINES, INC., NAVAJO FREIGHT LINES, INC., N.W. TRANSPORT SERVICE, INC., RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, SALT CREEK FREIGHT WAYS, TRANSCON LINES, UNITED BUCKINGHAM FREIGHT LINES And WESTERN GILLETT, INC.,

Petitioners,

VS.

CLIPPER EXXPRESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

At issue here is the proper balance to be struck between the antitrust laws and the right to petition guaranteed by the First Amendment, as enforced by this Court under the *Noerr-Pennington* doctrine.[1] The Court of Appeals struck the balance against the First Amendment. Also at issue is whether the fact of antitrust injury may rest upon speculation. The Court of Appeals conceded that the claim in this case involves speculation, but held the degree of speculation to be acceptable.

The specific questions presented are:

1. Are First Amendment rights lost if a motor carrier's protest against a competitor's rate tariff is alleged to be baseless where (a) only one protest is filed, (b) the tariff protested is novel and experimental, (c) the protest's lack of success is the only objective evidence offered to support the allegation that the protest was "baseless" and (d) the protest does not bar anyone's access to the administrative process?

2. Are First Amendment rights lost if a motor carrier is alleged to have made misrepresentations to an administrative agency in a legislative-type proceeding where (a) the carrier's adversary can and does respond to the representations (b) the agency disregards them and (c) the agency rules against the party making them?

3. May an antitrust plaintiff, whose rates must be filed with and allowed by an administrative agency, base the fact of damage on speculation that the agency would have allowed it to charge an experimental rate that was not filed with the agency?

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[1] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

LIST OF PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Ninth Circuit are those listed in the caption of this Petition and Lee Way Motor Freight, Inc. Consolidated Freightways Corporation of Delaware is owned by Consolidated Freightways, Inc. and through its parent is affiliated with United Terminals, Ltd., CF Air Freight, Inc., Canadian Freightways Eastern, Ltd., Interport Sufferance Warehouse, Ltd., CF Data Services, Inc., and Centron, Ltd. Illinois-California Express Inc., is owned by ICX, Incorporated. N.W. Transport Service, Inc., is owned by Northwest Transport Service, Inc., and through its parent is affiliated with North Eastern Motor Freight, Inc. and Westway Motor Freight, Inc. Rio Grande Motor Way is owned by Rio Grande Industries, Inc., and through its parent is affiliated with Denver and Rio Grande Railroad. Pacific Intermountain Express Co. is affiliated with Ryder Truck Lines, Inc., and is owned by IU Transportation Services, Inc., which in turn is owned by IU International Corporation. Garrett Freight Lines, Inc., is affiliated with Associated Truck Line, Inc., New Life Transport Parts Center, Inc., Road Equipment Inc. and Graves Truck Line, Inc., and is owned by ANR Freight System, Inc., which in turn is owned by American Natural Resources Company. Navajo Freight Lines, Inc., and Consolidated Copperstate Lines are now owned by ABF Freight System, Inc., which is owned by Arkansas Best Corporation and is affiliated with Riverside Furniture Corporation, Arkansas Bandag Corporation, Data-Tronics Corp., Container Carrier Corporation, Arkansas Underwriters Corporation, Universal Insurance Company and Trans-States Lines, Inc.

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Alexander v. *National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982)	12
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P. Areeda, ANTITRUST LAW (Supp. 1982)
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¶ 204.1d 14, 15, 16
Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521 (1977) 13
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R. Bork, THE ANTITRUST PARADOX 349 (1978) 10
K. Davis, ADMINISTRATIVE LAW TEXT § 6.03 (3d ed. 1972) 13
K. Davis, ADMINISTRATIVE LAW TREATISE § 7:6 (2d ed. 1979) 13
Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977) 10, 13
ICC 1981 ANNUAL REPORT, Appendix B, Table 7 13
E. Kintner, I FEDERAL ANTITRUST LAW § 5.12 (1980) 10
Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256 (1981) 13

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Petitioners,

VS.

CLIPPER EXXPRESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 1252 and is reproduced as Appendix A. The District Court wrote no opinion. Its unreported orders granting petitioners' motion for summary judgment and denying respondent's motion to vacate the judgment are reproduced respectively as Appendix B and Appendix C. The Court of Appeals' order denying Petitioners' Petition for Rehearing with Suggestion for Rehearing *en Banc* is reported unofficially at 1982-83 Trade Cases ¶ 65,063; it is reproduced as Appendix D.

JURISDICTION

The Court of Appeals' judgment was entered on April 19, 1982. A timely Petition for Rehearing with Suggestion for Rehearing *en Banc* was denied on October 6, 1982. (App. D) This Petition is filed within 90 days of that date. The Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the First Amendment to the Constitution of the United States. The statutes involved are 49 U.S.C. §§ 1005-06, recodified as §§ 10761(a), 10762(a)(1) and 10708(a)(1). They are set out verbatim in Appendix E.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a private antitrust action brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, by respondent Clipper Exxpress ("Clipper"). (C.T. 2) Clipper is a freight forwarder doing business as a common carrier regulated by the Interstate

Commerce Commission ("ICC") under the Interstate Commerce Act. Petitioners are Rocky Mountain Motor Tariff Bureau ("RMMTB"), an ICC-approved trucking rate bureau, and carrier members, some of whom compete with Clipper.

Clipper's antitrust claim is based upon RMMTB's protest of an experimental tariff series Clipper filed with the ICC. The protest was unsuccessful, and Clipper's rates went into effect as scheduled. Nevertheless, Clipper claims $90 million in damages (after trebling).

B. The Undisputed Facts.

The following facts were undisputed for purposes of the summary judgment motion. Almost all are based on Clipper's own admissions.

Interstate truckers (like the carrier defendants) and freight forwarders (like Clipper) may only charge rates that have been filed with and allowed by the ICC. (49 U.S.C. §§ 10761-62, 10708) Prior to 1970, the rate structure approved by the ICC for both truckers and freight forwarders generally specified different rates for different classes of commodities.

In 1970 Clipper decided to break from this rate structure and to charge a single rate for freight of all kinds, an "FAK" rate. Clipper wanted to set this rate at $842 per 30,000 pound shipment. However, Clipper knew that the ICC considered FAK rates to be suspect because they are potentially discriminatory and injurious to shippers of low-grade commodities.[2] Clipper also knew that if it published an FAK rate

[2] All-freight rates which apply on shipments of a single high-grade commodity necessarily ignore sound classification and commodity rate principles upon which the existing rate structures of the motor and rail carriers are constructed. If not restricted, such rates could break down these rate structures to the detriment of both the carriers and the public.

Merchandise To and From Chicago, 66 M.C.C. 287, 293 (1956). *See also TOFC Rates and Charges, Official Territory*, 337 ICC 557, 566 (1970).

This Court has held that FAK rates are not unlawful *per se*, but may be unlawful depending on their effects. *All States Freight* v. *New York, N.H. & N.R. Co.*, 379 U.S. 343 (1964).

as low as $842, "it would have been a guarantee—it would have been an absolute certainty it would have been suspended" by the ICC pending an investigation of its lawfulness. (Stelzer Deposition, p. 101) Clipper therefore decided not to ask the ICC for an FAK rate of $842 at the outset, but rather to move to that rate gradually, in pieces and over time. Thus, when Clipper filed its initial tariff ("Tariff 55"), in November 1970, it sought an FAK rate of $1,056 in a limited geographic area.[3] Clipper labeled Tariff 55 "experimental" right on its face, but Clipper did not disclose its intention ultimately to seek an $842 FAK rate for a broad geographic area.

Because Clipper's self-labelled "experimental" FAK Tariff 55 was a radical departure from the commodity rate system, RMMTB protested, requesting the ICC to investigate and disapprove Tariff 55 if it was unlawful.[4] The ICC's Board of Suspension found that there was "reason to institute an investigation to determine whether [Tariff 55] was . . . unjust and unreasonable" (C.T. 98-99, 133), but the ICC did not suspend the $1,056 rate, and its investigation did not prevent Clipper from operating under that rate immediately.

The ICC investigation was an adversary proceeding in which RMMTB and Clipper advocated their conflicting positions. The investigation lasted six months. On June 29, 1971, the ICC hearing officer approved the $1,056 FAK rate as a "lawful innovation and experiment." (C.T. 49) RMMTB appealed, but the decision was sustained by a Review Board on

[3] The tariff, designated as Freight Forwarders Tariff Bureau Tariff 55, applied to all transcontinental freight forwarders, but it was proposed and primarily defended before the ICC by Clipper alone.

[4] Prior to Clipper's experimental Tariff 55, defendants had not protested any freight forwarder tariff for three years. And, in the five years before that, defendants had protested only four of the 1,885 freight forwarder tariffs which sought reduced rates. (C.T. 605-06, 2138; Chambers Deposition, p. 100)

August 14, 1972, by Division 2 on May 31, 1973 and by the Commission itself on June 11, 1973.[5]

The ICC's investigation and the subsequent appeals did not prevent Clipper from pursuing its piecemeal filing strategy. Commencing February 16, 1971, it filed seven progressively lower and geographically broader rates under Tariff 55. The seventh and last of these new rates was filed September 16, 1972. It contained the $842 FAK rate Clipper ultimately had in mind. To prevent its protest of the $1,056 FAK rate from becoming moot, RMMTB protested each of Clipper's new FAK rates.[6] But Clipper's filing strategy worked exactly as it had planned. Although the ICC investigated some of the rates, it did not suspend any of them, and they all went into effect right on schedule.[7]

C. Proceedings Below.

Despite the unqualified success of its ICC strategy Clipper was not satisfied. On May 12, 1972, it filed this action, claiming that RMMTB's protest of Tariff 55 was a sham, that RMMTB defrauded the ICC and that defendants unlawfully conspired to fix their own transcontinental rates. Clipper claimed $90 million (after trebling) on the hypothesis that but for

[5] In 1977 Clipper filed an amended complaint alleging for the first time that during the ICC investigation RMMTB made misrepresentations to the ICC about carrier costs and about the law applicable to Tariff 55. (C.T. 778) However, Clipper admitted that the alleged misrepresentations about costs were made only *after* the ICC already had initiated its investigation. (Docket No. 509, Ex. D; C.T. 2123-28; Chambers Deposition, p. 321 and Exhibit 11) Clipper also admitted that it could and did respond to the alleged misrepresentations, that the ICC had its own independent information about carrier costs and, of course, the law, and that the entire investigation lasted less than six months. (Stelzer Deposition, pp. 51-55; Chambers Deposition, pp. 365, 373-74; R.T. Vol. 3, pp. 151-52; Docket No. 509, Ex. D) Thus, no representation by RMMTB caused the ICC's investigation, or affected its outcome, or prevented Clipper from operating under the rates it had filed.

[6] RMMTB did not protest other freight forwarder tariffs filed on behalf of Clipper during this period.

[7] The Court of Appeals' description of this process contains two significant errors. First, the ICC investigation lasted six months, not two years. (App. A, p. A-3) Second, Clipper's $842 rate was not filed at "the conclusion of [the] administrative process." (App. A, p. A-4) It was filed on September 16, 1972, eight months before the conclusion of the process. Thus, the process was brief and its pendency did not deter Clipper from filing and operating under any tariff it chose to file.

RMMTB's protest the ICC would not have investigated the $1,056 FAK rate, that Clipper would then have filed the $842 rate two years sooner than it did, that the ICC would not have investigated the $842 rate either and that the $842 rate would have increased its net profits by $30 million—more than 400 percent. (Docket No. 509, Exhibit B and Exhibit C, Answer to Interrogatory No. 34)

In June 1978, after six years and completion of discovery, defendants moved for summary judgment on the basis of Clipper's admissions and the undisputed facts.[8] The District Court found there was no dispute as to any material fact, that defendants' protest of Tariff 55 was protected by the First Amendment under the *Noerr-Pennington* doctrine and that Clipper's injury claim was speculative and barred as a matter of law by *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). Accordingly, the motion was granted and judgment was entered for defendants. (C.T. 2089-91) Clipper's motion to vacate the judgment and for reconsideration was denied. (C.T. 2233-34)

The Court of Appeals reversed. It held that:

1. The District Court erred in holding that RMMTB's protest of Tariff 55 was protected by the First Amendment. Instead, according to the Court of Appeals, a single administrative protest of an admittedly experimental tariff may be "baseless" and within the "sham" exception to the *Noerr-Pennington* doctrine, although there is no objective evidence of baselessness except the protest's lack of success and no evidence that the protest barred anyone's access to the administrative process. (App. A, pp. A-12-A-28)

2. The District Court erred in not letting Clipper go to trial on its claim of RMMTB's alleged misrepresentations to the

[8] In addition, for purposes of the motion only, defendants admitted (1) the existence of an alleged conspiracy to fix defendants' own transcontinental rates (because any such conspiracy was expressly exempted from the antitrust laws by 49 U.S.C. § 5b, recodified as 49 U.S.C. §10706, and, in any event, would not strip the protest of its immunity), and (2) that defendants' purpose in protesting Tariff 55 was to prevent and eliminate rate competition (because *Noerr* and *Pennington* both hold that efforts to influence public officials cannot violate the antitrust laws no matter how anticompetitive their purpose). (C.T. 1830, Docket No. 508, pp. 5, 31)

ICC. Instead, under the Court of Appeals' interpretation of *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), an antitrust plaintiff can get to trial by claiming that misrepresentations were made in a legislative-type ICC investigation, even though the plaintiff had full access to the ICC to refute the alleged representations, the ICC was not deceived by them and there was no evidence that the representations in any way corrupted the ICC's investigation. (App. A, pp. A-28-A-34)

3. The District Court erred in holding that Clipper's speculative injury claim was legally insufficient. Instead, according to the Court of Appeals, this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), allows a claim of antitrust injury to be based upon speculation that (1) a particular low experimental rate would have been filed two years sooner than it was filed, (2) the ICC would not have investigated the rate if it had been filed two years sooner than it was filed, and (3) the lower rate would have caused plaintiff's net profits to be $30 million higher than they actually were. (App. A, pp. A-39-A-42)

REASONS FOR GRANTING THE WRIT

I. Summary of Reasons for Granting the Writ

Defining the elements and proper scope of the "sham" exception to the *Noerr-Pennington* doctrine is an important and recurring antitrust problem that has divided the lower courts for the decade since this Court last addressed it. This case poses the problem in its clearest form, as a pure question of law. The Court of Appeals' holding that a single protest may be a "sham" although there is no objective evidence of baselessness except lack of success, and although the protest does not bar access to the administrative process, conflicts with the *Noerr-Pennington* doctrine as it has been defined by this Court and applied by other courts of appeals. The effect of the Court of Appeals' decision is to make the "sham" exception to *Noerr-Pennington* immunity so broad that it swallows up the immunity itself. This threat to the First Amendment right of petition makes the need for this Court to grant the writ all the more compelling.

The Court of Appeals' holding that an antitrust plaintiff can get to trial by claiming that misrepresentations were made to an agency in a legislative-type proceeding, even if plaintiff could and did respond to the alleged representations, and even if the agency was not deceived by them, is contrary to the Court's decisions in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and to the cases applying those decisions. The effect of the Court of Appeals' rule will be to chill the vigorous advocacy which is encouraged in forums where opposing parties are able to debate and to contradict one another. This problem is also one of continuing importance in the administration of the antitrust laws. The Court has not squarely addressed it for seventeen years.

The Court of Appeals' holding that the fact of injury in an antitrust case can rest upon speculation that an administrative agency would not even have investigated an experimental tariff for which its permission was required but not sought conflicts with this Court's decisions in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) and *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), and with decisions of other courts of appeals which hold that the trier of fact may not speculate about the fact of injury in antitrust cases. This, too, is a question of major importance to future antitrust litigation.

II. The Court of Appeals' Decision on the Sham Exception Conflicts with Decisions of This Court and Several Courts of Appeals and with the First Amendment Itself.

This Court held in *Noerr, Pennington* and *Trucking Unlimited*, that concerted efforts to influence governmental action (whether legislative, executive, judicial or administrative) are exercises of the right to petition that are absolutely immunized

from antitrust liability by the First Amendment.[9] The Court allowed for a narrow exception to this immunity where ostensible petitioning activity involves no real effort to influence a public official but rather is a "sham" to cover direct interference with a competitor. *Noerr*, 365 U.S. at 144.

Although the intersection between the First Amendment and the antitrust laws (the "charter of economic liberty") is a recurring problem of obvious importance, this Court has addressed it directly only once. In *Trucking Unlimited* the Court found the "sham" exception satisfied by allegations of three elements: a "pattern of [1] baseless, [2] repetitive claims" which produced an "illegal result, *viz.*, [3] effectively barring respondents from access to the agencies and courts." 404 U.S. at 513. This Court has not explicitly considered whether the "sham" exception might apply in the absence of one or more of these elements, but it has rendered decisions that make matters uncertain.[10]

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[9] For example, in *Noerr* the findings of fact established that in the course of seeking legislation the defendant railroads had conducted a malicious and fraudulent publicity campaign for the sole purpose of destroying truckers as competitors. The railroads' purpose was to injure the truckers in every way possible even though no legislation was secured, and the railroads actually did inflict direct injury on the truckers. 365 U.S. at 133, 138, 142-43. Nevertheless, this Court unanimously held that the legality of the railroads' campaign "was not at all affected by any anticompetitive purpose it may have had," that the fraud "was, so far as the Sherman Act is concerned, legally irrelevant" and that the direct injury which the railroads knowingly inflicted on the truckers was also immune as an inevitable effect of any campaign. 365 U.S. at 140, 142-44.

[10] In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), the Court seemingly held that the access-barring element was not required where the defendant was charged, not with preventing plaintiff from access to a court or agency, but rather with forcing plaintiff into litigation, the pendency of which blocked it from getting financing, and where the other two elements—multiple and baseless lawsuits—were present. In *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977), four dissenting Justices stated that the "sham" exception might apply to a single baseless lawsuit. Two concurring Justices squarely disagreed, while the three-Justice plurality stated that "*repetitive*, sham litigation . . . may constitute an antitrust violation," 433 U.S. at 635 n.6 (emphasis added), but otherwise took no position on the question. The Court of Appeals in this case says that in *Vendo* this Court was "given the opportunity" to decide whether the "sham" exception can apply to a single suit but "avoided the question." (App. A, p. A-21 n.24)

The uncertain state of the law in this Court is reflected in the lower courts and in the commentaries.[11] The lower courts are divided, for example, with respect to the elements of repetitive action[12] and access-barring.[13] (An outline of irreconcilable decisions on all aspects of the "sham" exception is set forth in Appendix F.) The Ninth Circuit itself is in a state of total confusion about the "sham" exception. After the decision in this case, another panel of that court declared:

> In this circuit, the sham exception was initially construed quite narrowly . . . but has recently been given broader application . . . . As we conceded recently, "There is no precise definition to the sham exception." . . . We therefore decline to utilize the sham-exception analysis here in our examination of the interests upholding *Noerr-Pennington.*

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[11] Commentators: R. Bork, THE ANTITRUST PARADOX 349 (1978) ("The Supreme Court's opinions in these cases by no means completely clarify the law and its criteria"); E. Kintner, I FEDERAL ANTITRUST LAW § 5.12, at 273 (1980) ("[T]he standard enunciated in *California Transport* . . . is a difficult standard to define"); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U. CHI. L. REV. 80, 86 (1977) ("[T]he Supreme Court's failure . . . to indicate the limits of the antitrust exemption for attempts to influence governmental action has understandably confused the lower courts").

Lower courts: *See, e.g., Metro Cable Co.* v. *CATV of Rockford, Inc.,* 516 F.2d 220, 225 n.6 (7th Cir. 1975) ("Commentators and courts have disagreed about the implications of [*Trucking Unlimited*]"); *Ross* v. *Bremer,* 1982-2 Trade Cases ¶ 64,746, at 71,618 (W.D. Wash. March 16, 1982) ("No satisfactory definition of the sham exception to *Noerr-Pennington* immunity exists"); *United States* v. *American Telephone & Telegraph Co.,* 524 F. Supp. 1336, 1362 (D.D.C. 1981) ("[I]n various cases the courts have come to conclusions that are not always easy to reconcile"); *City of Gainsville* v. *Florida Power & Light Co.,* 488 F. Supp. 1258, 1264-65 (S.D. Fla. 1980) ("Lower courts have variously interpreted the sham exception").

[12] The full extent of the division is shown in Appendix F. For example, compare *Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.,* 560 F.2d 211 (6th Cir. 1977) (requiring multiple actions), with *Feminist Women's Health Center* v. *Mohammed,* 586 F.2d 530, 543 n.6 (5th Cir. 1978) (holding one action sufficient), *cert. denied,* 444 U.S. 924 (1979).

[13] This division is also shown in Appendix F. For example compare *Miracle Mile Associates* v. *City of Rochester,* 617 F.2d 18, 21 (2d Cir. 1980) (requiring full access barring), with *Hydro-Tech Corp.* v. *Sundstrand Corp.,* 673 F.2d 1171 (10th Cir. 1982) (requiring interference with the legal process).

In re Airport Car Rental Antitrust Litigation, 1982-83 Trade Cases ¶ 65,039 at 70,792 n.3 (9th Cir. 1982) (citations omitted).

The conflicting decisions and uncertainty make parties' rights and duties vary by geographic accident and breed more litigation over the proper scope of the "sham" exception to *Noerr-Pennington.*

Despite this uncertainty, before the Ninth Circuit's decision here, no court had even suggested that the "sham" exception could be applied where *none* of the three *Trucking Unlimited* elements was present. That, however, is the effective result of the Court of Appeals' decision in this case. Under the "sham" exception fashioned by the court below, no "pattern of repetitive claims" is needed; one is enough. (App. A, pp. A-19-A-23) Nor is it necessary that the single protest or lawsuit be truly "baseless"; lack of success is enough objective evidence to get the plaintiff to trial—even if the protest is directed against a rate that is admittedly "experimental." (App. A, p. A-23)[14] Finally, there is no need to show access barring. (App. A, pp. A-23-A-28)

The Court of Appeals' expansive decision is a major departure from the "sham" exception that this Court defined narrowly to protect the First Amendment right to petition. Obviously the decision cannot be reconciled with *Trucking Unlimited.* Nor can it be reconciled with *Noerr,* where this Court held that even a malicious and fraudulent publicity campaign intended solely to injure a competitor, and which does directly injure him, is protected by the First Amendment from antitrust attack. (p.9, n.9, above)

The Court of Appeals' decision also conflicts with decisions from other circuits with respect to all three of the *Trucking Unlimited* elements. First, as the court below notes, there is a

[14] The Court of Appeals itself seems uncertain about this aspect of its decision. At one point it says that lack of success alone is sufficient proof of baselessness to prevent summary judgment. (App. A, p. A-23) At another point it says that lack of success is sufficient when combined with evidence that the protest was not filed with any intent to influence the ICC. (App. A, p. A-18)

clear split among the Circuits (as in this Court) regarding its conclusion that the "sham" exception can apply to a single protest or lawsuit. (App. A, p. A-21, n.24) *See* App. F, pp. F-52-F-55.

Second, contrary to the decision below, the courts in other Circuits have refused to treat lack of success as sufficient objective evidence of "baselessness." (App.F, pp. F-55-F-59) Indeed, some decisions have held that even lack of probable cause cannot properly be treated as a basis for applying the "sham" exception.[15]

Third, again contrary to the decision below, the Second, Seventh, Eighth, Tenth and District of Columbia Circuits all have held that the "sham" exception applies only where the defendants have barred the plaintiff's access to the administrative or judicial process.[16] Even in Circuits where true access barring is not required, the courts have explicitly required some other evidence of *interference* with the judicial or administrative process for the "sham" exception to apply.[17]

Taken separately, the components of the Court of Appeals' redefinition are questionable and unwise. Taken together, their practical effect is to vitiate *Noerr-Pennington* and to chill the exercise of First Amendment rights over a broad range of petitioning activity before a myriad of local, state and federal courts, agencies and boards. In particular, the Court of Appeals' holding that lack of success may be sufficient objective evidence to support a finding that a protest or other use of legal process was "baseless" must surely chill the exercise of those

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[15] *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1176 (10th Cir. 1982) (" 'sham' is something more than a mere 'absence of probable cause' "); *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1363-64 (D.D.C.1981). *See also Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1200 (8th Cir. 1982) (existence of "genuine disputes" precludes finding of baselessness).

[16] *See, e.g., Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) (" '[A]ccess barring is the cornerstone to the sham exception.' "); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 982 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978). *See also* other cases cited in Appendix F, pp. F-59–F-63.

[17] *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1176 (10th Cir. 1982). *See Mid-Texas Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 615 F.2d 1372, 1384 n.10 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1981).

rights.[18] The chilling effect is increased exponentially by the Court of Appeals' further holdings that just one unsuccessful action may invoke the "sham" exception and that it need not bar access to the process.

The most obvious effect of the decision below will be to deter the assertion of any novel or unusual legal theory. But the effect will be much broader than that. The decision will also deter the pursuit of even routine administrative and judicial action. For example, the ICC and most state administrative agencies have extremely broad discretion in determining whether a rate is acceptable.[19] Thus, inherent in *every* rate protest is a substantial risk that it will be unsuccessful. If the result of making an unsuccessful protest is what the Court of Appeals holds in this case, protest will be inhibited and state and federal agencies will be deprived of information they need to make informed decisions.[20]

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[18] It is clear that "baselessness" must be determined by an objective standard, and that lack of success is not sufficient. P. Areeda, ANTITRUST LAW ¶¶ 203.1c, 203.1e (Supp. 1982). Indeed, lack of success alone should not even be relevant to the question. As Professor Areeda puts it:

> The mere fact that the antitrust defendant was unsuccessful in the other forum does not mean that it was unreasonable of him to pursue his interest there. Many altogether reasonable claims or defenses are lost. While victory presumptively demonstrates reasonableness, defeat leaves that issue altogether open.

Id. ¶ 203.1e at 7.

[19] *See Aberdeen & Rockfish R.Co.* v. *SCRAP*, 409 U.S. 1207, 1208 (1972) (The Commission has "broad discretion in the exercise of its power of suspension. . . . "); *Akron, Canton & Youngstown R.Co.* v. *United States*, 586 F.2d 29, 32 (7th Cir. 1978) ("The Commission's broad discretion in the rate-making process applies to the separate elements of that process. . . . ").

[20] In 1981 alone there were 654,069 tariff applications filed with the ICC by carriers subject to its regulation. ICC 1981 ANNUAL REPORT, Appendix B, Table 7, at p. 105. Obviously, the ICC needs all the help it can get from interested parties.

> In our system of representative government, participation in governmental decision-making by persons affected by it is an affirmative good. This is particularly true in the case of administrative agencies. . . .

Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH L. REV. 521, 574 (1977). *Accord*, Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 118 (1977); Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1274 (1981); Bakke, *Joint Efforts in Developing Standards*, 44 ANTITRUST L. J. 337, 342 (1975); K. Davis, ADMINISTRATIVE LAW TEXT § 6.03 (3d ed. 1972); K. Davis, ADMINISTRATIVE LAW TREATISE § 7:6 (2d ed. 1979).

In sum, the Court should grant the writ to resolve conflicting decisions and to restore the proper balance between the antitrust laws and the First Amendment.

III. The Court of Appeals' Decision on the "*Walker Process* Doctrine" Conflicts with Decisions of This Court and Threatens the Exercise of First Amendment Rights.

The Court of Appeals' decision on the "*Walker Process* doctrine" is bad antitrust law, bad fraud law and bad for the exercise of First Amendment rights.

Contrary to what the court below says, this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), does not provide "antitrust liability for the commission of fraud on administrative agencies, for predatory ends." (App. A, p. A-29) *Walker Process* was an action to enforce a patent. The defendant counterclaimed under Section 2 of the Sherman Act, alleging that the patent had been obtained by plaintiff's fraudulent representations to the Patent Office. This Court held that if the patent was obtained by fraud, it would lose its antitrust exemption, and plaintiff's market position would be subject to regular antitrust analysis. 382 U.S. at 177. Under *Walker Process* it is not the fraud on the Patent Office that creates antitrust liability; rather, it is the enforcement of the unprotected monopoly.

This Court has never considered whether an allegation of fraud on an administrative agency by itself will support an antitrust claim. If and to the extent it will, there are good reasons for confining the doctrine to the unique patent setting involved in *Walker Process.* First, the patent application process is *ex parte,* even secret, 35 U.S.C. § 122; there is no adversary process and no independent source of information to help the agency learn the truth. This lack of safeguards makes a patent proceeding vulnerable to fraud in a way that most other agency proceedings are not. *See* P. Areeda, ANTITRUST LAW ¶¶ 204.1c at 29, 204.1d at 31 (Supp. 1982). Second, unless specific statutory criteria are satisfied, the Patent Office

has no power to issue a patent. (35 U.S.C. § 102) Thus, the effect of fraud on the Patent Office decision is certain. Other agencies, like the ICC here, have wide discretion in determining whether to grant a request; predicting what the agency would have done "but for" the fraud is entirely speculative. *See* P. Areeda, ANTITRUST LAW ¶ 204.1d at 30 (Supp. 1982). Third, the issuance of a patent automatically confers a complete monopoly. This immediate and obvious threat to competition is not present in most orders of other agencies.[21] In sum, in the patent setting the need for protection against fraud is great and the danger to competition is clear. This is not true of other agencies such as the ICC.

Moreover, even if the "*Walker Process* doctrine" applied outside the patent context, the Court of Appeals' version of it in this case bears no resemblance to *Walker Process*. In *Walker Process* the fraud served only to remove the antitrust immunity it had procured so that traditional antitrust principles could be applied. Here, the alleged fraud is held to be "*the basis for antitrust liability,* if the requisite predatory intent is present and the other elements of an antitrust claim are proven." (App. A, p. A-30; emphasis added) That holding makes no sense. If the other elements of an antitrust claim are proven, making fraud "the basis" of the claim is pointless. It is also wrongheaded, for it diverts attention from antitrust analysis and focuses it instead on an inflammatory issue having no antitrust or economic significance. That is bad antitrust law.

The Court of Appeals' decision is even bad fraud law, for it is a doctrine of fraud under which no one need be defrauded. Assuming RMMTB submitted false information to the ICC, it is undisputed that neither Clipper nor the ICC was deceived. Clipper responded with information and arguments of its own, and the ICC ruled against RMMTB. The Court of Appeals' only response to this fact is to say that *Walker Process* does not "*require* that the body on whom the fraudulent misstatements are pressed ultimately believe those statements." (App. A,

[21] This case, of course, does not involve any effect on competition. RMMTB's alleged fraud did not cause the ICC to issue any order or to do anything at all.

pp. A-32-A-33) That misses the whole point of *Walker Process*. If the Patent Office had known the truth it would not have issued the patent.[22] There would have been no case and no "*Walker Process* doctrine." The same should be true here. *See* P. Areeda, ANTITRUST LAW ¶ 204.1d (Supp. 1982).

Additionally, the Court of Appeals' "*Walker Process* doctrine" presents a clear threat to the legitimate exercise of First Amendment rights protected by the *Noerr-Pennington* doctrine. The court below refuses to acknowledge this, asserting that fraud in administrative or court proceedings is not protected by the First Amendment. (App. A, p. A-31) That is a truism; however, it does not come to grips with the problem and it ignores the teaching of *Trucking Unlimited*. First, it conflicts with the express statement in *Trucking Unlimited* that *Noerr-Pennington* immunity applies to claims of misrepresentation in legislative proceedings, and that a claim based on alleged misrepresentations could lie only if the proceeding were adjudicatory. The alleged misrepresentations here were in a rate making proceeding—a process that this Court has repeatedly described as legislative rather than adjudicatory. *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 386-89 (1932); *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). Thus, the "fraud" theory fails even the threshold test.

Second, *Trucking Unlimited* makes clear that First Amendment values may not be jeopardized by allowing antitrust claims based on simple allegations of fraud. As the Court observed, opponents in litigation frequently charge each other with fraud. For this reason, the Court held that there must also be an "illegal result." 404 U.S. at 513. The Court of Appeals' only answer to this point is to say that *Trucking Unlimited* did not involve "claims arising from the furnishing of fraudulent

[22] Indeed, it *could* not have issued the patent because the fraud concerned the extent of prior use of the invention, a statutory condition as to which the Patent Office has no discretion. 35 U.S.C. § 102(b). Here, of course, the ICC had discretion to investigate, suspend and disapprove Clipper's experimental tariff *regardless* of the truth or falsity of any representations by RMMTB. (p. 13 above)

information for predatory purposes." (App. A, p. A-34) That is no answer at all. A false representation that is not believed and has no effect is not even a common tort. *Alberta Gas Chemicals, Ltd.* v. *Celanese Corp.*, 650 F.2d 9 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3456 (Dec. 13, 1982) (specifically so holding with respect to fraud on an administrative agency). To make it sufficient evidence to support an antitrust violation, as the Court of Appeals has done in this case, is indefensible.

If such charges can be prosecuted as antitrust treble damage claims, with the enormous burden and expense that such claims entail, the net result will not be simply to eliminate fraud; it will also choke off the kind of robust debate that is favored where adversaries are present to contradict each other. That is why this Court in *Trucking Unlimited* imposed limitations on the circumstances in which such claims can be prosecuted, safeguards eliminated by the court below.

The Court should review and repudiate the "*Walker Process* doctrine" created by the Court of Appeals.

IV. The Court of Appeals' Decision Permits Speculation as to the Fact of Damage in Treble Damage Cases and Therefore Conflicts with This Court's Decisions in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), *and Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

The Court of Appeals' allowance of Clipper's damage claim conflicts with the settled general principle that precludes speculation on the fact of damage in antitrust cases, and with the particular application of that principle in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). In *Keogh*, the plaintiff shipper complained that a group of rail carriers had conspired to raise and fix freight rates higher than the rates that would have been charged absent the unlawful conduct. Plaintiff sought damages based on the extra profits it would have earned if the lower, non-fixed rates had continued in effect. This Court held as a matter of law that plaintiff could not recover such damages under the antitrust laws.

Since *Keogh*, the principle precluding speculation as to the fact of antitrust damage has become an axiom.[23] Moreover, it has been specifically applied to prevent a damage claim based on the assumption that the ICC or a similar agency would have permitted a regulated carrier to charge rates different from those on file.[24] Indeed, this application of the principle was reaffirmed only a year ago in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981). The Louisiana Supreme Court had held that natural gas producers were entitled to recover damages from their customers for breach of contract, measured by the difference between the rates actually filed with the Federal Power Commission and the rates that would have applied but for the breach of contract. This Court reversed, and said:

> No matter how the ruling of the Louisiana Supreme Court may be characterized, [petitioners] argue, it amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case. This, they contend, is precisely what the filed rate doctrine forbids. We agree. It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act.

453 U.S. at 578-79.

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[23] *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Shumate & Co.* v. *National Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 152 (5th Cir. 1975) ("[C]ourts do not permit the fact of damage necessary to prove liability to be based on speculation"), *cert. denied*, 423 U.S. 868 (1975); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966) (fact of damage must be established by a "reasonable probability there was a substantial causal connection" between plaintiff's injury and defendant's misconduct).

[24] *See Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 453 (1945); *Monticello Heights, Inc.* v. *Morgan Drive Away, Inc.*, 1974-2 Trade Cases ¶ 75,282 at 97,862 (S.D.N.Y. Sept. 30, 1974) (damages based on hypothetical rate determination are "entirely speculative" and cannot be awarded); *City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. 763, 770 (D. Del. 1979) (no legal right to pay or receive any price other than that fixed or accepted by FPC); *McLeran* v. *El Paso Natural Gas Co.*, 357 F. Supp. 329 (S.D. Tex. 1972), *aff'd without op.*, 491 F.2d 1405 (5th Cir. 1974).

The Court of Appeals' decision here would destroy the principle. The Court of Appeals acknowledges that one of the bases of *Keogh* was that judicial relief "would require the [antitrust] court to speculate on the level [at which] the rate would have been set by the carriers and approved by the ICC absent the conspiracy, thereby assuming what ICC action would be." (App. A, p. A-41) The Court of Appeals also acknowledges that Clipper's primary damage claim is that petitioners' protest prevented it from filing the $842 rate for two years. Thus, it rests on the hypothesis that if Clipper had filed the $842 rate two years earlier than it did, the ICC would have approved it. (App. A, p. A-39, A-41) And the Court of Appeals agrees that "there is no certainty the rate would have been approved." (App.A, p. A-42) Nevertheless, it concludes that Clipper can make the damage claim because "[t]he speculation involved in the instant case . . . in no way approaches the degree of speculation disallowed in Keogh." (*Id.*)

The Court of Appeals' analysis is dead wrong. The degree of speculation disallowed in *Keogh* was far less than that involved in this case. In *Keogh* the plaintiff wanted to assume only that a rate which actually had been in effect would have *continued* in effect. 260 U.S. at 160. In this case the plaintiff wants to assume that an experimental rate that had *never* been in effect, and that was expected to draw protest, would have gone into effect without even an investigation two years before it was actually filed.

More important, this Court held the assumption in *Keogh* to be speculative simply because the ICC was empowered to disapprove the rate. 260 U.S. at 164. Thus, the question does not turn on a court's assessment of the degree of speculation involved. *Keogh* forbids *any* speculation about what the ICC would have done with respect to an unfiled rate.

In sum, the Court of Appeals has opened the door to damage claims requiring antitrust courts to make hypothetical rate decisions even the ICC is not empowered to make. *See* 260 U.S. at 162. Beyond that, the court below has opened the door to speculation about the fact of damage in antitrust cases

generally, where the consequence of miscalculation is trebled. This Court should review the decision below and close these doors.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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January 3, 1983

Appendix A
Court of Appeals' Opinion

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 78-3684

Clipper Exxpress, a corporation,
Plaintiff-Appellant,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., Yellow Freight Systems, Inc., Consolidated Freightways Corporation of Delaware, Illinois-California Express Inc., IML Freight Inc., Pacific Intermountain Express Co., T.I.M.E.—D.C. Inc., Consolidated Copperstate Lines, Garrett Freight Lines, Inc., Navajo Freight Lines, Inc., N.W. Transport Service, Inc., Ringsby Truck Lines, Inc., Rio Grande Motor Way, Salt Creek Freight Ways, Transcon Lines, United Buckingham Freight Lines and Western Gillette, Inc.,
Defendants-Appellees.

[April 19, 1982]

As Amended July 29, 1982.

Appeal from the United States District Court for the Northern District of California.

Before: WALLACE and ALARCON, Circuit Judges, and von der HEYDT,* District Judge

ALARCON, Circuit Judge:

Plaintiff Clipper Exxpress (Clipper) appeals from the entry of an order granting summary judgment for the defendant

* Honorable James A. von der Heydt, Chief United States District Judge, District of Alaska, sitting by designation.

trucking companies and Rocky Mountain Motor Tariff Bureau (RMMTB) [hereinafter jointly referred to as defendants]. Clipper sued defendants for various antitrust violations arising from protests filed with the Interstate Commerce Commission (ICC) by defendants with regard to certain shipping rates published[1] by Clipper. The district court granted summary judgment for defendants based on (1) the *Noerr-Pennington*[2] exception to the antitrust laws, which the district court held cloaked the defendants' actions with immunity, and (2) the *Keogh*[3] doctrine, which the district court held barred the recovery of damages in this antitrust action. We reverse and remand for a trial on the merits because neither the *Noerr-Pennington* exception nor the *Keogh* doctrine provide defenses as a matter of law under these facts.

FACTS

Clipper is an ICC-regulated freight forwarder, subject to regulation under the Interstate Commerce Act (ICA). As a freight forwarder, Clipper itself ships no goods, but rather assembles and consolidates small shipments into single lots for shipment by carrier companies.

Defendants are ICC-regulated trucking companies and the RMMTB. RMMTB is a rate bureau formed under the ICA. A rate bureau is an organization formed by an agreement among common carriers. Through the bureau the carriers act collectively to initiate, consider and establish rates and fares for members of the bureau. When acting in conformity with an ICC-approved agreement, joint rate setting action is not subject to the antitrust laws. 49 U.S.C. § 10706. RMMTB's membership consists of approximately 1,400 motor carriers, and represents approximately 80 percent of the transcontinental surface transportation market.

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1. Publishing is simply the act of filing a new rate with the ICC.

2. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

3. *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922).

ICC rate regulation of freight forwarders such as Clipper is provided in 49 U.S.C. § 1005, recodified as 49 U.S.C. §§ 10725, 10762. Under § 1005, a freight forwarder seeking a rate change publishes a new rate. In the absence of a protest, the rate will take effect automatically thirty days later. If there is a protest, the ICC can suspend effectiveness of the rate while investigating the protest. The ICC also retains power to suspend any new rate sua sponte, but this power is rarely exercised.

In the late 1960's, freight forwarding was a failing industry. The freight forwarding industry suffered heavy traffic losses because of the competition presented from "shipper associations" and "shipper agents" whose rates were unregulated. An ICC investigation revealed that the freight forwarder's economic predicament was due to the lower rates of these unregulated associations. The ICC recommended that the freight forwarders lower their rates to compete effectively with the lower rates of unregulated associations.

In November 1970, Clipper, in order to compete with the rates of the unregulated associations, published Tariff 55, a lowered rate of $1,056 per 30,000 pound shipment. Clipper hoped to eventually lower its rate to $842 per 30,000 pounds. Clipper fully expected defendants to protest to the ICC any lowered rate it published.[4] Clipper hoped that by publishing the intermediate $1,056 rate instead of the lower $842 rate, the ICC would not act on defendants' anticipated protest by investigating and suspending implementation of Clipper's new rate. Clipper intended to lower its rate to 842 if the ICC did not investigate and suspend the intermediate rate.

As expected, a few days after the $1,056 Tariff 55 was published, RMMTB filed a protest to Tariff 55 with the ICC. The ICC did not suspend the $1,056 rate, but did investigate the rate over the next two years. During the course of the ICC investigation, Clipper filed several amendments to Tariff

4. Clipper alleged that RMMTB had always tried to maintain the rates of freight forwarders and carriers at an equal level (parity) and would take forceful action—including protests—to maintain that parity.

55—which both extended the geographical coverage of the rate and progressively lowered the rate. RMMTB protested each amendment. The ICC found for Clipper throughout its investigation. The defendants exhausted all the ICC procedures in order to prevent implementation of Tariff 55, and received no relief. At the conclusion of this administrative process, Clipper lowered Tariff 55 to the $842 level; defendants' protest to this rate was also unsuccessful.

THE PROCEEDINGS BELOW

In 1972 Clipper filed a complaint in district court against RMMTB and various trucking companies, alleging antitrust violations. In addition, to avoid the general principle that genuine efforts to induce legislative or administrative action, even if undertaken for the purpose of stifling competition, are outside the scope of the antitrust laws, Clipper relied on three theories in its pleadings. First, Clipper contended that defendants' protests of Tariff 55 were sham protests filed "for the purpose of directly restricting, lessening, and prohibiting the legitimate competition" of freight forwarders. Second, Clipper contended[5] that defendants attempted to influence ICC action by supplying fraudulent information to the ICC. Clipper relied on the *Walker Process*[6] doctrine, which extends antitrust liability to one who commits fraud on a court or agency to obtain competitive advantage. Finally, Clipper contended that the protests were simply part of a larger independent antitrust violation.[7]

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5. This claim was asserted in an amended complaint filed February 3, 1977.

6. *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965).

7. It should be noted that the fact that a party successfully establishes that the *Noerr-Pennington* exception is inapplicable does not entitle it to a judgment. Such a showing would merely establish that defendant's conduct was subject to the antitrust laws. "[T]he absence of an immunity does not itself establish an antitrust offense. To prevail, the plaintiff must demonstrate that any non-immune behavior meets the standard tests defining an antitrust violation." Areeda & Turner, Antitrust Law § 201 (1978).

Clipper claimed it sustained thirty million dollars of damages because of the actions of defendants and sought treble that amount. These damages allegedly represented (1) the loss incurred by Clipper in having to delay over two years before instituting its final $842 rate; (2) the costs in having to respond to the protests; and (3) business loss because of the instability and uncertainty surrounding Clipper's rates, due to the ICC investigation. Clipper claims that shippers will not use a rate if it is under ICC investigation.

Proceedings were stayed by the district court judge to permit the ICC to rule on defendants' protests. After the ICC overruled all the protests, court proceedings were revived.

After denying two previous motions by the defendants for a summary judgment, defendants' third summary judgment motion was granted on July 27, 1978, and entered on July 31, 1978. The district court held that the protests to the ICC were immune as a matter of law, relying on *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977). Moreover, the district court held that Clipper was attempting to collect damages which rest on assumptions as to ICC actions, and held this was prohibited as a matter of law by *Keogh* v. *Chicago & N. W. Railroad Co.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922).

JURISDICTION

The defendant-appellees contend that this court is without jurisdiction over this appeal because Clipper did not file its Notice of Appeal within the requirements of Rule 4(a) of the Federal Rules of Appellate Procedure.

Timely filing of a Notice of Appeal is a prerequisite to this court's appellate jurisdiction. *See Browder* v. *Director, Department of Corrections,* 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54

L.Ed.2d 521 (1978). We find that this Notice of Appeal was timely filed and we therefore hold that this court has jurisdiction over this appeal.[8]

Rule 4(a) of the Federal Rules of Appellate Procedure provides that a Notice of Appeal is to be filed within thirty days of entry of judgment. The thirty-day period, however, is tolled by the timely service of a Rule 59(e) motion to reconsider and vacate the judgment. If a 59(e) motion is timely served, the time for filing a Notice of Appeal is tolled and does not begin running until the district court disposes of the 59(e) motion. *See* Fed.R.App.P. 4(a)(4).[9]

Summary judgment for defendants was entered on July 31, 1978. Ten days later, on August 10, 1978, Clipper *served* a notice of motion and a motion to reconsider and vacate the order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, supported by a memorandum of points and authorities. Clipper filed this motion in the district court on August 14, 1978. The motion was argued on September 11, 1978 and denied on October 13, 1978. Twenty-four days after the denial, on November 6, 1978, Clipper filed its Notice of Appeal.

Defendants contend that Clipper's 59(e) motion was not sufficient to toll the time for appeal on two grounds. First, defendants contend that the material served by Clipper on August 10 was incomplete, and therefore could not toll the time for filing a Notice of Appeal. Specifically defendants contend that because the motion itself stated that it was based on affidavits, and affidavits were not served with the motion, the

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8. Because we reverse the grant of summary judgment and remand for a trial on the merits, we need not determine whether the district court judge acted properly in denying Clipper's 59(e) motion to vacate and reconsider.

9. Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." *See Pacific Maritime Ass'n* v. *Quinn*, 465 F.2d 108, 109 n.1 (1972) (service, not filing, tolls the running of time to file notice of appeal). Clipper served its 59(e) motion on August 10, 1978, after a July 31, 1978 entry of judgment. Thus, under the rules of time computations provided in Rule 6(a) of the Federal Rules of Civil Procedure, this motion was served within the time strictures established in 59(e).

motion was not a valid, complete 59(e) motion. Second, defendants contend that Clipper's 59(e) motion simply rehashes the arguments made in the summary judgment motion, and therefore does not constitute a valid 59(e) motion. We find no merit in either of these arguments.

A. *Complete Motion*

The defendants' contention that Clipper's 59(e) motion was incomplete because the supporting affidavits were not filed within the time for service is spurious. The 59(e) motion was complete, valid, and sufficient to toll the running of time to file the Notice of Appeal without the affidavits. Rule 59(e) itself does not require supporting affidavits. The only indication in the Federal Rules of Civil Procedure as to what is necessary to constitute a valid motion is found in Rule 7(b)(1). Rule 7(b)(1) states that a motion "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."[10]

10. Rule 6(d) of the Federal Rules of Civil Procedure states: "When a motion is supported by affidavit, the affidavit shall be served with the motion. . . ." If, as here, a motion is complete without supporting affidavits, there is no reason to determine whether compliance with this filing requirement is jurisdictional when the affidavits are necessary to make the motion complete. We note, however, the position of the Seventh Circuit in *Schy* v. *Susquehanna Corp.*, 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970).

In *Schy*, the Seventh Circuit held that when the plaintiff did not complain of untimeliness of filing affidavits at the district court level, any objection based on that untimeliness was waived on appeal. *Id.* at 1116. It is questionable whether any proper objection to the untimeliness of these affidavits was raised at trial. Clearly, the defendant-appellees did not object to the late filing of the affidavits. They commented only that the affidavits came too late to substantively oppose the summary judgment. That is irrelevant to the 59(e) motion. A defendant who is not a party to this appeal questioned the timeliness of the affidavits under Rule 59(c) of the Federal Rules of Civil Procedure. Rule 59(c) relates to filing affidavits to support a motion for new trial, and does not apply to a 59(e) motion.

Because we hold, however, that the 59(e) motion was complete without the affidavits we need not determine whether the 59(c) assertion was sufficient to preserve the question of timeliness for appeal.

Clipper's 59(e) motion as originally served set out the grounds on which the motion was based with particularity. Along with the motion, Clipper filed a 65-page document of supporting points and authorities, which raised substantive legal questions about the summary judgment motion without the need for the additional factual support that the affidavits would provide. This was more than sufficient to satisfy the particularity requirement of Rule 7(b). Defendants cite *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53 (2nd Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 140 (1976), and *Martinez* v. *Trainor*, 556 F.2d 818 (7th Cir. 1977), in support of their contention that Clipper's motion was incomplete. Neither of these cases suggest that the motion filed by Clipper was insufficient and invalid as a 59(e) motion.

Daily Mirror is clearly distinguishable from the instant case. In *Daily Mirror* the plaintiffs filed a motion to vacate under Rule 60(b) of the Federal Rules of Civil Procedure after the trial judge granted summary judgment for defendants. 60(b) motions, even if valid, do not toll the time for filing notice of appeal. In footnote, the *Daily Mirror* court noted that while under some circumstances a court has discretion to treat a 60(b) motion as a 59(e) motion, such treatment would be inappropriate in this case. The court noted after deciding not to consider the rule 60 motion as a rule 59 motion, that the papers which were filed within the proper filing period were not a complete motion because they did not deal with the merits of the motion. It was only the late filed affidavits that dealt with the merits of the challenged summary judgment. 533 F.2d at 56 n.4. Defendants' reliance on *Martinez* v. *Trainor* is similarly unpersuasive. The motion filed in *Martinez* was insufficient as a complete motion. It noted, in less than a page, that the defendants requested the court pursuant to 59(e) to "alter, amend, or vacate" the earlier judgment. 556 F.2d at 819. The motion did not set forth the grounds for the motion with any particularity. It was, as noted by the Seventh Circuit, simply a skeleton, which required later supplementation to satisfy the particularity requirements of 7(b)(1). This is in marked

contrast to Clipper's motion which, as noted above, satisfied the particularity requirements of Rules of Civil Procedure. Defendants' contention that Clipper's papers are insufficient to qualify as a 59(e) motion is without merit.

B. *Failure to Raise New Grounds*

Defendants contend that Clipper's motion, without affidavits, advances no new grounds for vacating the judgment.[11] A motion which simply rehashes arguments heard at trial, defendants contend, does not properly lie under 59(e). *Assuming arguendo* that Clipper's 59(e) motion raises no new grounds, it nevertheless constitutes a proper 59(e) motion.

Rule 59(e) provides a mechanism by which a trial judge may alter, amend, or vacate a judgment. *See Foman* v. *Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Rule 59(e) provides an efficient mechanism by which a trial court judge can correct an otherwise erroneous judgment without implicating the appellate process. As noted by this court in *United States* v. *Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979): "Errors in the trial court may be most speedily corrected by the trial judge. Frequently a trial judge has had to rule on difficult questions under time pressures and without thorough briefing by the parties. A motion for reconsideration may, in some instances, avoid the necessity of an appeal."[12] Clipper's motion

11. The defendants cite *Durkin* v. *Taylor*, 444 F.Supp. 879, 889-90 (E.D.Va.1977); *Erickson Tool Co.* v. *Balas Collet Co.*, 277 F.Supp. 226, 234 (N.D.Ohio 1967), *aff'd.*, 404 F.2d 35 (6th Cir. 1968); *Chastain* v. *Kelley*, 510 F.2d 1232, 1238 n.7 (D.C. Cir.1975), for the proposition that a 59(e) motion is not proper if it advances no new grounds in seeking to vacate a judgment. None of these cases involved the question of whether the motion tolled the running of time to file notice of appeal. All were concerned with whether the motion should have been granted. That is not at issue here. Furthermore, the position of these cases, in holding that a 59(e) motion must raise new grounds, is questionable. There is much authority to the contrary. *See Dove* v. *Codesco*, 569 F.2d 807, 809 (4th Cir. 1978); *Sonnenblick Goldman Corp.* v. *Norwalk*, 420 F.2d 858, 859 (3d Cir. 1970); *Parks* v. *"Mr. Ford"*, 68 F.R.D. 305 (E.D.Pa.1975).

12. This Circuit, in determining whether a motion for a new trial was timely, noted in dictum: "It is true that the motion for an extension of time

(footnote continued on following page)

enabled the trial judge to reconsider the validity of his judgment, and to vacate or alter it as he saw fit. As such, it was valid as a 59(e) motion.[13] Since Clipper filed its Notice of Appeal within 30 days after the district judge denied its Rule 59(e) motion, we therefore have jurisdiction, pursuant to Rule 4(a), to review the order granting summary judgment for defendants.

STANDARD OF REVIEW

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Gaines* v. *Haughton,* 645 F.2d 761, 769-70 (9th Cir. 1981). All facts and inferences drawn therefrom must be viewed in the light most favorable to the non-moving party. The moving party has the burden to establish the non-existence of any triable issue of fact. The defendants, here, established the nonexistence of a material issue of fact by making several admissions for the purposes of the motion. In their memorandum accompanying the motion, the defendants made the following admissions:

> For the purposes of this motion, the court may assume the existence of the conspiracy alleged in Clipper's interrogatory responses. It may further assume that everything was done that Clipper says was done to further that conspiracy.

(footnote continued from previous page)

within which to file a motion for new trial stated no grounds for which a new trial would be sought; but the fact that this motion, considered as an inartfully drawn motion for new trial was so defective that it could not properly be granted, would not serve to render it non-existent. This court has held that in order to suspend the running of the 30-day appeal period allowed by Rule 73(a) a motion for new trial need not be granted or even grantable." *Yanow* v. *Weyerhaeuser S.S. Co.,* 274 F.2d 274, 283 (9th Cir. 1959) (en banc), *cert. denied,* 362 U.S. 919, 80 S.Ct. 671, 4 L.Ed.2d 739 (1960).

Under this liberal approach, Clipper's motion was clearly sufficient to toll the time for filing a Notice of Appeal.

13. Because we hold that the record before the trial judge at the time the summary judgment was granted did *not* support that judgment, we need not consider the late filed affidavits in reaching our holding. Therefore, defendants' contention that the late filed affidavits could not be used to support reversal of summary judgment need not be considered.

> Again, for the purpose of this motion, the court may accept Clipper's allegations as fact and assume that defendants expressly agreed among themselves not to cut rates to divert traffic from one another—or to put it more bluntly, that they agreed that their rates would be exactly the same. Such an agreement would be perfectly lawful and immunized from antitrust liability.
>
> This court may assume for purposes of this motion that the object behind each of the protests was just what Clipper says it was—that the defendants who filed them were simply trying to eliminate or destroy competition.

The defendants, not once but three times, expressly represented to the district court that it could "assume for the purposes of this motion" that they had done exactly what Clipper alleged in its complaint. Their consistent position was that as a matter of law, the conduct alleged in the complaint did not state a legally-cognizable claim for damages under the antitrust laws. Therefore, we need only decide whether the district court correctly determined that, under the facts alleged, Clipper's antitrust claims were barred as a matter of law. As the district court recognized in its order granting summary judgment for the defendants, "[w]ith regard to the motions for summary judgment, the issues are purely legal ones."[14]

THE MERITS

As noted above, Clipper alleged in its complaint three ways in which the defendants' protests to the ICC constituted antitrust violations. First, the protest was alleged to be a direct

14. Ordinarily, the proper mode of testing the legal sufficiency of the allegations of a complaint is by way of a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). Such a motion can be made at any time, and normally will be made before any substantial discovery has been conducted. However, where, as here, evidence outside the record is submitted to and not excluded by the district court, any such motion must be disposed of by way of the summary judgment procedures specified in Rule 56(c). See Fed.R.Civ.P. 12(b).

interference with competitive activity, and a sham protest not immune under the *Noerr-Pennington* doctrine. Second, in protesting to the ICC, defendants allegedly furnished false information to the ICC, Clipper's business [sic]. Lastly, defendants' protest was simply an act in furtherance of an independent rate-fixing violation of the antitrust laws.[15]

I. THE PROTESTS AND NOERR-PENNINGTON IMMUNITY

Defendants contend that the district court properly found that the protests before the ICC were immunized from antitrust liability because of the *Noerr-Pennington* doctrine. Under the *Noerr-Pennington* doctrine, bona fide efforts to obtain or influence legislative, executive, judicial or administrative actions are immune from antitrust liability. *See* 7 von Kalinowski, Antitrust Laws and Trade Regulation § 46.04 (1980). If the purported effort to influence or obtain government action is in reality only an attempt to interfere with the business relationships of a competitor, however, the activity does not enjoy antitrust immunity. *Noerr*, 365 U.S. at 144, 81 S.Ct. at 533.

The evolution of *Noerr-Pennington* immunity, and its concomitant sham exception, begins in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81

15. In a short order granting RMMTB's motion for summary judgment, the district court held: (1) Clipper's "claim, insofar as it is based on defendants' protests before the Interstate Commerce Commission, is barred by the ..." *Noerr-Pennington* doctrine. "Plaintiff's attempt to invoke the 'sham' exception to that immunity... is... foreclosed by the narrow reading of that exception announced in *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers*...." The district court continued: "Furthermore, plaintiff's damage claims, which rest on assumptions as to action that would have been taken by the ICC in the absence of defendant's alleged antitrust violations are barred by *Keogh* v. *Chicago & N. W. Ry. Co.*..." The district court order did not individually consider the viability of the theories alleging that the furnishing of fraudulent information constituted an antitrust violation and that the protest was simply part of an independent antitrust violation.

S.Ct. 523, 5 LEd.2d 464 (1961).[16] In *Noerr*, truck operators and their trade association sued railroads, an association of presidents of those railroads, and a public relations firm alleging the defendants conspired to restrain trade in violation of §§ 1 and 2 of the Sherman Act. Specifically it was alleged that the defendants engaged in a "publicity compaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers." *Id.* at 129, 81 S.Ct. at 525.

The defendants argued that their activities could not create liability under the Sherman Act when they were only trying to inform the public and the legislature of certain facts. The Supreme Court agreed, noting "that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135, 81 S.Ct. at 528. The Court held that even if the defendants' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers' business, the immunity remained. "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.* at 139, 81 S.Ct. at 530.

In this same case the Court also recognized that a sham attempt to influence governmental action would not be immune: "There may be situations in which a publicity campaign,

16. An analysis of cases dealing with the *Noerr-Pennington* doctrine is subject to the following caveat:

> [E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 579 [45 S.Ct. 578, 583, 69 L.Ed. 1093] (1925).

ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144, 81 S.Ct. at 533.

The antitrust immunity established in *Noerr* for bona fide attempts to influence governmental action was reaffirmed in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In *Pennington,* a small coal company cross-claimed against the UMW, trustees, and certain large coal operators, alleging that they had conspired to restrain and to monopolize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act. The Union and large companies agreed upon steps to exclude the marketing, production and sale of non-union coal. Together they successfully approached the Secretary of Labor to obtain a minimum wage requirment for employees of contractors selling coal to the TVA, making it difficult for small companies tc compete in TVA term contracts. Other executive action was sought and obtained.

The Court held that the acts seeking governmental action were immune from antitrust liability. The Court noted that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." Id. at 670, 85 S.Ct. at 1593. "[T]he legality of the conduct 'was not at all affected by any anti-competitive purpose it may have had,' . . . even though the 'sole purpose in seeking to influence the passage and enforcement of laws was to destroy . . . competitors. . . .'" Id. at 669, 85 S.Ct. at 1593.

In *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Court extended the *Noerr-Pennington* doctrine to attempts to influence administrative and judicial (adjudicatory) bodies, while holding that a cause of action had been stated under the "sham" exception. In *Trucking,* a group of highway carriers

operating in California sued a group of interstate highway carriers, alleging violations under § 4 of the Clayton Act. The first group of highway carriers alleged that the second group conspired to institute state and federal proceedings to resist and defeat applications by the first group to acquire operating rights or to transfer or register those rights.

The *Trucking* Court held that the *Noerr-Pennington* doctrine doctrine protects genuine efforts to influence adjudicatory bodies. The Court noted, however, that the allegations in that case gave rise to a cause of action under the sham exception to that doctrine. The Court noted that allegations that proceedings were instituted without probable cause, and regardless of merit, state a cause of action which falls within the exception to *Noerr*. Although the Court did not set forth the parameters of the sham exception, it did list *examples* of activity which might come within the exception.[17]

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17. Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-77, 86 S.Ct. 347, 349-50, 15 L.Ed.2d 247. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Cabide & Carbon Corp.*, 370 U.S. 690, 707, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777; *Harman* v. *Valley National Bank*, 339 F.2d 564 (CA 9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851 (CA 9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression." 404 U.S. at 512-13, 92 S.Ct. at 613.

In *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), *on remand,* 360 F.Supp. 451 (D.Minn. 1973), *aff'd,* 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974), Otter Tail Power monopolized the distribution of power to various communities. Otter Tail prevented those communities from creating their own marketing organizations by instituting and supporting litigation designed to prevent or delay the establishment of the municipal power systems. The United States sued Otter Tail under the antitrust laws. Rendering its decision before *Trucking Unlimited* had been decided, the district court held that Otter Tail did not enjoy *Noerr* immunity, because that immunity did not extend to efforts to influence the administrative or judicial process.

The Supreme Court remanded in light of *Trucking Unlimited,* noting that although *Noerr* immunity might be applicable in this case, so might the sham exception. *Id.* at 380, 93 S.Ct. at 1031. On remand, the district court held that Otter Tail's conduct fell within the sham exception.[18] 360 F.Supp. 451 (D.Minn. 1973). The Supreme Court summarily affirmed. 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974).

The defendants in the instant case argue on appeal that their conduct does not fall within the sham exception because the evidence shows the conduct was intended to influence governmental action. At the district court, however, the defendants admitted that for the purposes of this motion "the object behind the protests [was] . . . simply . . . to eliminate or destroy competition."

It is unquestionably true, as defendants assert, that *Noerr-Pennington* confers antitrust immunity for conduct *genuinely* intended to influence governmental action. Whether something

18. The district court wrote: "[T]he repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly . . . the litigation comes within the sham exception to the Noerr doctrine as defined by the Supreme Court in *California Transport* . . . ." 360 F.Supp. at 451 52 [sic].

is a genuine effort to influence governmental action, or a mere sham, is a question of fact. The facts here show, however, that this conduct is not the type that is entitled to immunity; it is not in fact conduct intended to influence governmental action.

Clipper, for the purposes of the summary judgment motion, has sufficiently shown that defendants' protests were spurious, baseless, and prosecuted without regard to their merit, intended only to delay competitive action, not to influence governmental action. The defendants, in advance of Clipper's filing reduced tariffs, agreed through RMMTB to institute proceedings before the ICC for the purpose of restricting and prohibiting competition from any freight forwarders. In furtherance of this agreement, the defendants—particularly RMMTB—would automatically protest any forwarder tariff, regardless of the rate's legality or competitive justification. These protests were put forward in the interest of maintaining parity between the rates of freight forwarders and motor carriers and were prosecuted without regard to the merits of the protest. Therefore, the defendants' intent, admitted for the purpose of their motion, was not to induce favorable administrative action from the ICC, but rather to saddle Clipper with such onerous regulatory and administrative burdens that it would be forced to withdraw the rates.

The defendants contend on appeal that their protests were filed and prosecuted with the intent of influencing governmental action. The defendants contend that the undisputed facts establish that the protests were efforts to influence governmental action. We disagree.

The fact that their intent was to prevent price competition by Clipper is not determinative. Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition. However, Clipper sought to bring its claims within the "sham" exception by contending that the defendants protested rates automatically, without regard to merit or possible success before the

ICC, and therefore without any intent to induce favorable action by the ICC. These allegations fall within the sham exception as a matter of law. Baseless protests, instituted without regard to merit, are "nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr,* 365 U.S. at 144, 81 S.Ct. at 533.

On remand, Clipper will need to establish the facts supporting this theory. However, we note that while the success or failure of the protests is not singularly determinative of a party's intent, this Circuit regards such success or failure as indicative of a party's intent. *See Ernest W. Hahn, Inc.* v. *Codding,* 615 F.2d 830 at 841 n.13 (9th Cir. 1980). Here, defendants' protests to Clipper's reduced rates were unsuccessful. This, combined with the assumed facts as to the defendants' intent, is enough to prevent the defendants from being cloaked with *Noerr* immunity as a matter of law.

TRUCKING UNLIMITED'S APPLICATION OF THE SHAM EXCEPTION

Defendants' more substantial contention is that *Trucking Unlimited* itself precludes application of the sham exception in this case. Defendants contend that to fall within the sham exception, *Trucking* requires that the alleged misconduct (1) consist of a pattern of repetitive claims; (2) be baseless; and (3) bar access to the governmental body. We disagree. Although all of these elements can be found under the peculiar facts of *Trucking Unlimited,* nothing in *Trucking Unlimited* requires that all of these elements be present for the sham exception to apply.

PATTERN OF REPETITIVE CLAIMS

Defendants claim that because they protested only one tariff, Tariff 55, the sham exception does not apply and they retain *Noerr* immunity. Assuming that defendants' acts con-

stituted only one protest, we do not find any merit in this contention.[19]

An examination of the theoretical underpinnings of *Noerr-Pennington* and the sham exception indicates that it is unnecessary to allege and prove more than the institution of a single suit or protest to invoke the sham exception.[20] The *Noerr-Pennington* doctrine is itself a judicially created exception to the application of the antitrust laws based on the first amendment.[21] First amendment protection is extended and application of the antitrust laws suspended because a legitimate

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19. Whether defendants' protests constitute one or multiple claims is a matter of interpretation. There is one basic tariff—Tariff 55—involved here. During the course of the investigation, however, Tariff 55 was modified by Clipper many times. After each modification the defendants lodged a new protest. Each protest was necessary to preserve the initial protest, or else the newly revised Tariff 55 would go into effect, mooting the prior protest. Whether this constitutes one or multiple claims in unclear. We need not reach that question because we find the sham exception applicable even if there is only a single claim involved.

20. The conduct which the *Trucking Unlimited* Court held to fall within the sham exception constituted a pattern of repetitive claims. The defendant highway carriers in *Trucking Unlimited* continually instituted state and federal proceedings to defeat applications by other highway carriers to acquire operating rights or to transfer or register those rights. In holding that a cause of action under the sham exception was stated, the Court referred to "a pattern of baseless, repetitive claims [which] may emerge [and lead] the factfinder to conclude that the administrative and judicial process have been abused." 404 U.S. at 513, 92 S.Ct. at 613.

21. *Noerr* advanced at least three arguments for the exception, but did not clearly adopt any. First, the Court noted that there is an "essential dissimilarity" between agreements to seek government action and those agreements traditionally condemned by the antitrust laws. This essential dissimilarity, "even if not itself conclusive on the question of the applicability of the [antitrust laws], does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint." 365 U.S. at 136-37, 81 S.Ct. at 528-29.

Second, the Court noted that finding liability for legitimate efforts to effect [sic] government "would substantially impair the power of government to take actions through its legislative and executive that operate to restrain trade." *Id.* at 137, 81 S.Ct. at 528. The nature of a representative government requires that the government act on behalf of the people, and to make representation work, requires that the people indicate their wishes to the government.

(footnote continued on following page)

effort to influence government action is part of the guaranteed right to petition. *Trucking Unlimited,* 404 U.S. at 510, 92 S.Ct at 611.

The sham exception, on the other hand, reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the first amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor. In that case, the "sham" petitioning activity is not entitled to first amendment protection, *because it is not an exercise of first amendment rights.*

If the activity is not genuine petitioning activity, the antitrust laws are not suspended and continue to prohibit the violating activities. Because application of the antitrust laws is not suspended, it will prohibit sham activity, whether that activity consists of single or multiple sham suits. This analytical framework does not permit a conclusion that single sham suits are protected under *Noerr.*[22]

(footnote continued from previous page)

Finally, the *Noerr* Court noted that finding liability for legitimate efforts to influence government would raise serious constitutional questions. The right to petition government is guaranteed in the first amendment. Therefore, it cannot be infringed by a statute, and the court will not "lightly impute to Congress an intent to invade these freedoms." *Id.* at 138, 81 S.Ct. at 530.

The Court in *Pennington* was no more definite about the basis for the exception.

The *Trucking Unlimited* Court continually spoke to the first amendment right to petition, while extending *Noerr* to attempts to influence courts and administrative bodies, i.e., "The right of access to the court is indeed but one aspect of the right of petition." 404 U.S. at 510, 92 S.Ct. at 611. "Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment." *Id.* at 513, 92 S.Ct. at 613.

22. The existence of multiple suits will undoubtedly make it easier to prove that a party did not have the requisite legitimate intent to influence government that is necessary to invoke the first amendment protections of *Noerr.* We are not, however, concerned here with the ultimate ability of a plaintiff to succeed at trial. Rather, we are concerned with a plaintiff's ability

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Indeed, the Court in *Trucking Unlimited* mentioned several types of activity that could constitute antitrust violations, despite the fact that only single instances of conduct are involved. Specifically, the Court mentioned "[u]se of a patent obtained by fraud to exclude a competitor from the market," and "bribery of a public purchasing agent." 404 U.S. at 512-13, 92 S.Ct. at 612-13.[23] These examples involve only a single act, yet the Court notes that they are prohibited by the antitrust laws. Given this language, and absent any contrary indication by the Supreme Court, [24] there is no reason to believe that the Court

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to avoid summary judgment. As to proof at trial, it is entirely conceivable that the requisite sham intent can be proven when there is only a single sham suit.

23. We recognize that the fraud and bribery mentioned in *Trucking Unlimited* do not involve the petitioning activity that is the heart of the *Noerr-Pennington* doctrine. Defendants have not, however, presented any basis for finding this distinction relevant. The *Trucking Unlimited* Court itself treated the fraud and bribery as analogous to the sham petitioning activity for the purposes of antitrust liability.

24. In *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977), the Supreme Court was given the opportunity to decide whether the sham exception was applicable in a case in which only a single suit was involved. The Supreme Court, in a three-opinion decision, avoided the question. *Vendo* involved a federal litigant attempting to enjoin state litigation, on the grounds that the single state suit constituted an antitrust violation. A three-justice plurality opinion refused to enjoin the state suit, holding an injunction was improper under the anti-injunction statute. The two-justice concurring opinion wrote that an injunction was improper because the single suit would not be sufficient to constitute a cause of action under the sham exception. Four dissenters wrote that the suit was not barred by the anti-injunction statute, and that a single claim was enough to constitute a cause of action under the sham exception. The dissent noted, as we noted above, that the *Trucking Unlimited* Court itself wrote that in certain cases single acts constituted antitrust violations. Moreover, the dissent found no language in *Trucking Unlimited* which would bar a claim based on a single suit. We are convinced by the dissent.

Lower courts, in cases preceding *Vendo Co.* v. *Lektro-Vend Corp.*, have split on whether repetitive suits are necessary to have an actionable antitrust violation. *Compare Huron Valley Hosp., Inc.* v. *City of Pontiac*, 466 F.Supp.1301, 1314 (E.D.Mich.1979); *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 462 F.Supp. 1072, 1103 (N.D.Ill. 1978); *Mountain Grove Cemetery Assn.* v. *Norwalk Vault Co.*, [1977], 428 F.Supp. 951

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intended to extend the sham exception only to cases involving repetitive claims.[25]

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(D.Conn.1977); *Central Bank of Clayton* v. *Clayton Bank*, 424 F.Supp. 163, 167 (E.D.Mo.1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2978, 53, L.Ed.2d 1095 (1977) (all requiring multiple, repetitive suits), *with Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530, 543 n.6 (5th Cir. 1978), *cert. denied, sub nom., Palmer* v. *Feminist Women's Health Center*, 444 U.S. 924, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979); *Colorado Petroleum Marketers Assn.* v. *Southland Corp.*, 476 F.Supp. 373, 377-78 (D.Colo.1979); *First Nat'l Bank of Omaha* v. *Marquette Nat'l Bank* [1980], 482 F.Supp. 514 (D.Minn.1979); *Technicon Medical Information Systems Corp.* v. *Green Bay Packaging Inc.*, [1980] 480 F.Supp.124 (E.D.Wis.1979); *Cyborg Systems, Inc.* v. *Management Science America, Inc.*, [1978] Trade Reg.Rep. (CCH) Trade Cas.¶ 61,927, at 73,918 (N.D.Ill.1978); *Associated Radio Serv.* v. *Page Airways, Inc.*, 414 F.Supp. 1088 (N.D.Tex.1976) (all holding that a single suit is sufficient).

25. The commentators agree with this interpretation. *See* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U.Chi.L.Rev. 80, 110 (1977) ("The touchstone of the traditional sham exception—the absence of a genuine intent to influence the government—suggests that although repeated lawsuits are highly probative, *they are not necessary to constitute a sham.*") (emphasis added); Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L.Rev. 39, 55 56 [sic] (1980) ("The 'pattern of baseless repetitive claims' language of *California Motor Transport* will be treated by some as making multiple sham suits a prerequisite for antitrust liability. However, the better analyses will be those which look behind this language to the precedents relied upon in *California Motor Transport* and which, like Justice Stevens' dissent in *Lektro-Vend*, view those words as an 'illustration' of an antitrust violation and not a minimum standard. The single sham suit can be a very significant restraint of trade or act in furtherance of monopolization, and it should be prohibited by the Sherman Act. More importantly, . . . the constitutional guarantee of the right of petition which underlies *Noerr-Pennington* immunity protects only legitimate suits and not sham litigation, whether that litigation consists of one knowingly baseless complaint or many.") Our view that a single sham action is sufficient is not inconsistent with the holding in *Ad Visor, Inc.* v. *Pacific Telephone & Telegraph Co.*, 640 F.2d 1107 (9th Cir. 1981). In *Ad Visor*, we stated "Multiplicity, by itself, does not vitiate the *Noerr-Pennington* protections." Id. at 1109.

In support of this view, we relied upon the following language from Justice Blackmun's concurring opinion in *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 2881, 33 L.Ed.2d 1009 (1977): "Since I believe that federal courts should be hesitant indeed to enjoin ongoing state court proceedings, I am of the opinion that a pattern of *baseless*, repetitive claims or *some*

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Given the theory supporting both the *Noerr-Pennington* doctrine and the sham exception, and absent any contrary indication from the Supreme Court, we hold that a single suit, or in this case a single protest, is sufficient to invoke the sham exception.

BASELESS CLAIMS

Defendants contend that to come within the sham exception, plaintiff must allege and show that the claims prosecuted were baseless. Defendants claim that since their claims were not baseless, the grant of summary judgment is proper. We disagree. Assuming that baseless claims must be shown, the record before the district court reveals that the defendants' protests of Tariff 55 were baseless.

The defendants admitted *arguendo* that their protests were filed automatically and without regard to merit. This establishes that defendants' protests were baseless for the purposes of the motion. Indeed, the fact that defendants lost all protests establishes a sufficient showing of baselessness for the purposes of a summary judgment motion. This is certainly sufficient to present a triable issue of fact.

ACCESS DENIAL

Relying again on *Trucking Unlimited*, defendants contend that Clipper cannot invoke the sham exception unless it establishes that defendants' actions deprived Clipper of access to the ICC. Defendants claim that because Clipper was successful before the ICC in fighting the protests, and also made numerous filings with the ICC during the protest period, Clipper was not deprived of either actual or meaningful access to the ICC. Defendants' contention is erroneous.

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equivalent showing of grave abuse of the state courts must exist before an injunction would be proper." 433 U.S. at 644 (emphasis added).

Thus, it is not the number of claims which is controlling, but whether the evidence shows that the claim or claims filed constitute an abuse of process. Where the facts are in dispute, this is a question for the trier of fact.

The defendants claim that *Trucking Unlimited* requires access barring as a prerequisite to application of the sham exception. In *Trucking Unlimited* the Court noted that the plaintiffs alleged, in establishing a sham claim, that defendants "petitioning" activity denied them free and unlimited access to administrative and judicial tribunals. 404 U.S. at 511, 92 S.Ct. at 612. The Court, in holding that a cause of action was stated under the sham exception, based its decision on alternative grounds—access barring and also the fact that the administrative and judicial process had been abused. *Id.* at 513, 92 S.Ct. at 613. In *Trucking Unlimited,* the concepts of access barring and abuse of judicial process were treated interchangeably because the defendants' intervention in the administrative process in that case involved both. Subsequent decisions of the Supreme Court indicate that the access-barring language of *Trucking Unlimited* referred only to the particular circumstances in that case, and did not establish access barring as a prerequisite to a sham exception suit.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), *on remand,* 360 F.Supp. 451 (D.C. Minn.1973), *aff'd mem.* 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974), the Court held that a cause of action under the sham exception was made out in the absence of any allegation of access barring. The *Otter Tail* defendants used litigation to suppress competition, and in fact gave the plaintiffs greater access to courts by instituting lawsuits. *Otter Tail* indicates that the term "access barring" refers only to one type of abuse of judicial or administrative process and that "access barring" need not be present for the maintenance of a suit under the sham exception.[26]

26. In the following cases, the Court indicated that sham claims were appropriate, even though access barring was absent. *See Vendo Co.* v. *Lektro-Vend Corp.,* 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (all three opinions assume the filing of baseless lawsuits with the purpose of elimination of competition could constitute an antitrust violation) ("sham litigation in state courts may constitute an antitrust violation") (plurality opinion) *Id.* at 635 n.6, 97 S.Ct. at 2889 n.6; (pattern of baseless repetitive claims may

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Defendants contend that despite the Supreme Court's decision in *Otter Tail,* access barring is a prerequisite to a sham suit in the instant case. They contend that (1) the cases where access barring was not required are distinguishable from the instant case, because in those cases there was no administrative body involved to which access could be denied. Rather, in those cases the petitioning activity was first directed to courts. In this case, however, there was an administrative body (the ICC) to which access could be denied; and (2) *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977), requires access barring as an element of a sham claim. We are not persuaded by either contention.

Neither *Otter Tail* nor any subsequent Supreme Court case indicates that access barring is required when the petitioning activity is directed towards an administrative body although it is not required if the petitioning is directed to the courts. Moreover, such a holding seems senseless. The same dangers that the antitrust laws seek to prohibit flow from instituting sham administrative proceedings as flow from instituting sham judicial proceedings. Harassment of a rival through an administrative proceeding may have the same anticompetitive effect as harassment through the court system. We therefore see no reason to distinguish between cases in which there is primary resort to an administrative body and cases where the primary

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constitute antitrust violation) (concurring opinion) *Id.* at 643-44, 97 S.Ct. at 2893-94; ("illegal use of state court litigation as a method of monopolizing or restraining trade is . . . a violation of the antitrust laws") (dissenting opinion) *Id.* at 653, 97 S.Ct. at 2898; *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S 389, 405, 98 S.Ct. 1123, 1132, 55 L.Ed.2d 364 (1978) (anticompetitive litigation in the courts can constitute antitrust violation); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.,* 439 U.S. 96, 110 n.15, 99 S.Ct. 403, 412 n.15, 58 L.Ed.2d 361 (1978) ("Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws").

resort is to the court system. In fact, *Trucking Unlimited,* when discussing the dangers of abuse of process, groups judicial and administrative process together. 404 U.S. at 513, 92 S.Ct. at 613 ("the administrative and judicial processes have been abused").

Defendants also suggest that in *Franchise Realty* this court held that access barring is a necessary element of a sham claim. Defendants, however, ignore the most recent pronouncement of this circuit. In *Ernest W. Hahn, Inc.* v. *Codding,* 615 F.2d 830 (9th Cir. 1980), this court found a cause of action under the sham exception was stated despite the absence of access barring. The *Hahn* court stated:

> It has been suggested that *Franchise Realty* requires a showing of some activity other than the alleged abuse of process and perhaps a showing that the plaintiff has been barred from meaningful use of the agency or tribunal. *See Handgards, Inc.* v. *Ethicon, Inc.,* 601 F.2d 986, 998 (9th Cir. 1979) (Kennedy, J. concurring), *cert. denied,* 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980). While *Franchise Realty* may be read in this manner . . . in view of what the decision itself says when discussing *Otter Tail* and the later Supreme Court decision in *Vendo,* we decline to follow this interpretation under the alleged facts in this case." 615 F.2d at 841 n.14.[27]

Defendants also contend that we must require proof of access barring here if "the *Noerr-Pennington* doctrine is to protect protest activities at all." Defendants claim that if we did not require access barring, every competitor who was adversely

27. *Franchise Realty* is very different from the instant case. In *Franchise Realty* the defendants opposed plaintiffs' applications for building permits. The body which acted on the permits was "as much a political as an adjudicatory body." 542 F.2d at 1079. The defendants were successful in their opposition. Here, in contrast, the defendants opposed the plaintiff's applications in a pure adjudicatory body. As the *Trucking* court noted, activity which is acceptable before a political body is not necessarily acceptable before an administrative or judicial body. *See* 404 U.S. at 513, 92 S.Ct. at 613. Moreover, in the instant case, the defendants' protests uniformly failed.

affected by the filing of a protest would file an antitrust suit against the protesting party. This increased litigation, defendants claim, would deter the exercise of first amendment rights. We disagree.

The Supreme Court in *Otter Tail* held that a sham exception cause of action was stated, despite the absence of access barring. We see no reason to hold otherwise here. All laws create the possibility of litigation. Congress, in its wisdom, enacted the antitrust laws. We have no cause here to second guess the judgment of Congress. Defendants have not shown how their first amendment rights have been infringed by the antitrust laws, nor have they presented any reason to believe that our holding will adversely affect the future exercise of first amendment rights. To prove an antitrust violation under the sham exception, a plaintiff must prove the usual elements of any antitrust violation in addition to proving that a defendant's actions that ostensibly appear as petitioning activity were not genuine efforts to influence governmental action; rather they were nothing more than an attempt to interfere directly with the business relationships of a competitor. This is a heavy burden. Neither the first amendment nor the antitrust laws require that we make it any heavier by adding the requirement of access barring.

We have found no precedent nor any reason to require access barring before the sham exception can be invoked.[28] Thus, we conclude that to invoke the sham exception, some

28. The commentators have also agreed with our interpretation.

See R. Bork, The Antitrust Paradox, 354 (1978) ("Certainly, in a proper case, a proved intent not to bar competitors from the courtroom but, by the litigation of baseless claims, to bar them from a market or to delay their entry should suffice for a violation of the Sherman Act"); Areeda & Turner, Antitrust Law ¶ 203b at 41 (1978) ("Because the would-be competitors [in *Trucking Unlimited*] had first to obtain a license from an administrative agency, the Court spoke of defendants' alleged misbehavior as revealing 'a purpose to deprive the competitors of meaningful access to the agencies and courts.' But harassment of rivals through administrative adjudication would seem equally reprehensible and anti-competitive whether or not the actual or potential rival would himself be obliged to seek a license to enter the market in question.")

abuse of process, although not necessarily access barring, must be alleged. Because it was sufficiently alleged here, the summary judgment was improper.

FRAUD

In its amended complaint Clipper alleged that the defendants provided the ICC with fraudulent information in connection with the rate protests, and that therefore the defendants were liable for treble damages under the Sherman Act.[29] Specifically Clipper claimed that the defendants, "[t]o give

29. The defendants, in a footnote in their brief, also claim that the action for fraud is barred by the statute of limitations. Section 4B of the Clayton Act, 15 U.S.C. §15b, provides the applicable four-year statute of limitations. Defendants contend that the first fraud claim was asserted in an amended complaint six years after the alleged fraud occurred, and five years after the action was filed, and is accordingly barred by the four-year statute of limitations in the Clayton Act. Even if we assumed the truth of all defendants' allegations, we would not agree with their conclusion that the fraud claim is barred by the statute of limitations.

Rule 15(c) of the Federal Rules of Civil Procedure provides in pertinent part: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Under the relation back doctrine of Rule 15(c), the allegations of a new theory in an amended complaint will not be time barred if the theory involves the same transaction, occurrence, or core of operative facts involved in the original claim. *See 3 Moore's Federal Practice* ¶ 15.15[3], at 15-194 (3d ed. 1980); Wright & Miller, 6 Federal Practice and Procedure § 1496 (1971). In the instant case, the initial complaint alleged antitrust violations involving the defendants' protests to the ICC. The fraud claim in the amended complaint also alleged antitrust violations arising from the protests. The *protests involve a single transction or occurrence.* Therefore, the claims involving fraud *relate back* to the filing of the first complaint, and are not time barred.

We are mindful that the relation back doctrine of Rule 15(c) is to be liberally applied. Moreover, as recognized by the Fifth Circuit: "This liberality is particularly persuasive in antitrust suits where there is ample opportunity for discovery and other pretrial procedures." *Woods Exploration & Producing Co., Inc.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1300 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972).

Here, the initial complaint clearly put defendants on notice that their conduct involving the protests was being challenged in court; the purposes of the statute of limitations were satisfied. In the absence of any evidence of prejudice to defendants caused by the late filing of the fraud claim, there is no reason to find it time barred.

their sham protests the appearance of merit and thereby subvert the purpose of § 15a(3)[30], . . . knowingly understated their costs; they knowingly overstated the forwarders' costs; they deliberately misrepresented to the ICC that Clipper's charges were substantially below defendants' charges and therefore constituted 'destructive competition' in violation of national transportation policy; and they made countless other misrepresentations of both fact and law . . . . "

The district court's order did not specifically deal with the fraud issue; hence it did not address a rule of law known as the *Walker Process* doctrine, which provides antitrust liability for the commission of fraud on administrative agencies, for predatory ends. We therefore remand to the district court for a determination of whether the defendants' actions constituted an antitrust violation in that they perpetrated fraud on an administrative agency, for predatory ends.

Imposing antitrust liability for supplying fraudulent information in an administrative proceeding derives from *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965). In *Walker Process* the question was "whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under § 2 of the Sherman Act,

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30. 49 U.S.C. §15a(3), recodified as 49 U.S.C. §10704(d), provides:

> In a proceeding involving competition between carriers of different modes of transportation . . . the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy. . . .

Section 15a(3) has been held to require the protesting carrier mode to establish that it has the inherent cost advantage. This may be shown by comparing fully allocated costs and establishing that the proposed rate is below protestants' fully allocated costs. *See ICC* v. *New York, New Haven & Hartford R.R. Co.*, 372 U.S. 744, 83 S.Ct. 1038, 10 L.Ed.2d 108 (1963); *American Commercial Lines Inc.*, v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571, 88 S.Ct. 2105, 20 L.Ed.2d 1289 (1968).

and therefore subject to a treble damage claim by an injured party under § 4 of the Clayton Act." *Id.* at 173, 86 S.Ct. at 348. The Supreme Court held that "the enforcement of a patent procured by fraud on the Patent office may be violative of § 2 . . . provided the other elements necessary to a § 2 case are present." *Id.* at 174, 86 S.Ct. at 348[31]

This Circuit has never clearly extended the *Walker Process* doctrine to cases not arising in a patent context.[32] We are directly presented with the issue. We hold that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven.

As the Supreme Court noted in *Trucking Unlimited,* the adjudicatory sphere is much different from the political sphere. There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the

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31. The *Walker Process* doctrine is not limited to fraud on the Patent Office. The fact that *Walker Process* provides a rule of general applicability was intimated in *Trucking Unlimited,* in which Justice Douglas wrote that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." 404 U.S. at 513, 92 S.Ct. at 613.

32. *See, e.g., Mt. Hood Stages, Inc.* v. *Greyhound Corp.,* 555 F.2d 687, 696 (9th Cir. 1977), vacated and remanded on other grounds 437 U.S. 322, 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978).

> The lengthy [jury] instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* . . . and *California Motor Transport Co.* v. *Trucking Unlimited.* . . . *Greyhound* argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. . . . At most . . . the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.
>
> When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, *we do not believe they present even this issue.* (emphasis added) (citations omitted).

parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws. *See, e.g., Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272, 275-80 (D.C. Cir.1972).

Because of the admissions made in defendants' memorandum accompanying its motion for summary judgment, we must assume as proven that the defendants knowingly provided the ICC with fraudulent information in connection with their rate protests in determining whether a claim based on the furnishing of fraudulent information is stated sufficiently to withstand summary judgment. Clipper's specific allegations which as judicial admissions are to be accepted as proven are set forth above. We find that these assumed facts are sufficient to establish a triable cause of action under the antitrust laws.

Defendants contend, however, that no cause of action based on fraud is stated because: (1) their acts and statements are immune under the first amendment; (2) the ICC ultimately found for Clipper and therefore the defendants' acts did not defraud the ICC; and (3) access barring is required and Clipper was not denied access to the ICC. We are not persuaded by any of these contentions.[33]

There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been interpreted to preclude liability for false statements. For example, defamatory statements can be made the basis for liability. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11

33. Defendants also contend that Clipper's claim of fraud is refuted in the record, because the ICC began its investigation into Clipper's Tariff 55 before defendants made their fraudulent representations. Even if this is true, the fraud may have resulted in a longer, more in depth, investigation. We express no opinion here on the ultimate merits of the fraud claim. We are holding here only that a cause of action for fraud is presented—whether it can be proven is not our concern at this point.

L.Ed.2d 686 (1964). 18 U.S.C. § 1001 imposes criminal penalties for knowingly and wilfully concealing or misrepresenting material facts before any department or agency of the United States. Courts uniformly punish perjury. As the Supreme Court stated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974); "there is no constitutional value in false statements of fact." Contrary to defendants' assertions, there is simply no basis to hold that deliberately misrepresenting facts to an administrative body for anti-competitive purposes enjoys blanket first amendment protection.

Defendants contend that if first amendment protection is not extended to their statements, robust debate would be chilled. While we recognize that under certain circumstances allowing the imposition of liability for statements can hamper debate, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), this possibility does not require that all such statements be immunized from liability. It may suggest that a court should adopt a stricter standard of proof, or certain additional elements should be required. *See id.* (interest in public debate requires that to establish defamation by media against public official, plaintiff show statement was made with knowledge of or reckless disregard for falsity). Regardless of degree of protection which might be found appropriate for protecting defendants' statements from antitrust liability, those limits have been exceeded here. Clipper claims defendants knew the falsity of their statements, and made those statements in a deliberate attempt to mislead a regulatory body. We can conceive of no stricter standard than that satisfied by the facts alleged by Clipper. We see no reason to extend first amendment protection here.

Defendants contend that no cause of action for fraud is stated because the ICC rejected defendants' arguments and found for Clipper, and therefore the ICC was not defrauded by the defendants. This analysis is deficient. First, neither *Walker Process*, nor subsequent cases, *see Israel* v. *Baxter Laboratories*,

466 F.2d 272 (D.C.Cir. 1972); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701 30 L.Ed.2d 736 (1972), *require* that the body on whom the fraudulent mistatements are pressed ultimately believe those statements. Moreover, the underlying theoretical basis of the *Walker Process* doctrine does not support such a narrow interpretation of the doctrine.

Walker Process recognizes that fraudulently supplying information can result in monopolization, and therefore violate the antitrust laws. The doctrine is not concerned with whether the body intended to be influenced by the information is ultimately defrauded; a cause of action is established so long as the elements of an antitrust claim are alleged and the violation is executed through fraudulently supplying information. Whether the body is ultimately defrauded by the information may affect the extent of the monopolization—and thus affect damages.

We find significant support for our findings in both policy and practice. Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies[34] and courts, however, rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigations. The recognition, however, of a private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts.

34. We note that in an amicus brief the ICC has urged us to find that deliberate misrepresentations of material facts to the ICC will make out an antitrust claim if other elements of an antitrust claim are present. The ICC states that "many government agencies the size of the [ICC] have only a small staff to monitor the actions of litigants and must rely on the parties to tell the truth. Thus, a misrepresentation could go undected unless another party who becomes aware of the wrongdoing comes forward and reports it to public authorities. The incentive provided by treble damage recovery [of antitrust laws] would give parties a monetary inducement to bring to light such wrong-doing."

Moreover, we are not persuaded that Clipper should be deprived a remedy and defendants should be immunized from liability simply because Clipper was not denied access to the ICC. There is simply no basis for requiring a denial of access to the agency as a prerequisite for an antitrust claim for fraud. Defendants contend that both *Trucking Unlimited* and *Franchise Realty* require access barring in this context. Neither of these cases, however, involved claims arising from the furnishing of fraudulent information for predatory purposes. Moreover, *Otter Tail* establishes, as noted earlier, that an antitrust claim based on litigation can exist without access barring. The grant of summary judgment on this claim was not proper.

IV. OVERALL SCHEME

Clipper alleges, finally, that the defendants engaged in a rate fixing conspiracy, part of which involved defendants' protests to the ICC, and that this conspiracy constitutes a separate violation of the antitrust laws independent of any petitioning activity that might enjoy *Noerr* immunity. For several years the defendants engaged in a practice by which they refrained from offering lower rates to each other's customers. This practice was enforced by censure, and if necessary, by vigorous protests against competitive rate publications. Clipper contends that this conduct constitutes a horizontal conspiracy to fix prices and allocate the relevant market, *per se* violative of the Sherman Act. Moreover, defendants prosecuted deliberately false protests against Clipper's lower rates to enforce and protect their illegal price fix/customer allocation. Clipper thus contends that the defendants' prosecution of litigation in furtherance of their unlawful scheme constituted an antitrust violation, and the overall scheme was not excused by immunity provisions in the ICA nor *Noerr* immunity.

The defendants assert that § 5a of the ICA, 49 U.S.C. §5b, recodified as 49 U.S.C. § 10706, provides immunity for this conspiracy to fix rates. Furthermore, the defendants contend that the *Noerr-Pennington* doctrine protects petitioning activity whether or not that activity is in furtherance of an independent

antitrust violation. In its summary judgment order, the district court did not specifically consider the viability of this "overall scheme" contention.

An antitrust violation does not enjoy immunity simply because an element of that violation involves an action which itself is not illegal. In *Trucking Unlimited* the Court emphasized the existence of liability for antitrust violations, even though an integral part of the violation may involve otherwise legal and protected activity.

The court stated:

> Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by [competitors]. That right, as indicated, is part of the right to petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. 404 U.S. at 513-14, 92 S.Ct. at 613.

Similarly, we hold that when there is a conspiracy prohibited by the anti-trust laws, and the otherwise legal litigation is nothing but an act in furtherance of that conspiracy, general antitrust principles apply, notwithstanding the existence of *Noerr* immunity. In so holding we are acting consistently with the theoretical underpinnings of the *Noerr* doctrine. As we noted above, *Noerr* immunity is based on the first amendment right to petition and to seek to influence governmental action. *See Trucking Unlimited,* 404 U.S. at 510 12, 92 S.Ct. at 611 12 [sic]. When, however, the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity. As the Court noted in *Trucking Unlimited:*

> First Amendment rights may not be used as the means or the pretext for achieving "substantive evils". . . which the

> legislature has power to control. Certainly the constitutionality of the antitrust laws is not open to debate.... If the end result is unlawful, it matters not that the means used in violation may be lawful. 404 U.S. at 515, 92 S.Ct. at 614.

We agree. If Clipper can prove that the defendants engaged in activities which violated the antitrust laws, those violations do not become immune simply because the defendants used legal means—protests before the ICC—as a means to enforce the violations.

We find significant support for our holding in Supreme Court and circuit court decisions. *United States* v. *Singer Manufacturing Co.*, 874 U.S.174, 83 S.Ct. 1776, 10 L.Ed.2d 823 (1963), held that a cause of action under the antitrust laws was stated when an integral part of the violation was prosecution of patent infringement actions. In *Singer*, the defendants conspired to eliminate Japanese competition from the American sewing machine market. To eliminate this competition, the defendants assigned patents and prosecuted patent infringement actions against Japanese competitors. The Supreme Court held that this aggregation of patents and prosecution of infringement suits constituted an actionable violation of the antitrust laws.

The instant case is analogous to *Singer*. Here, the allegation is that the defendants conspired to fix rates and allocate customers, and used the protest mechanism of the ICC to further this conspiracy. Protests before the ICC are legitimate mechanisms for enforcing rights. Even if the protests to the ICC were legitimate, if they were part of a larger antitrust conspiracy, the conspiracy is subject to the antitrust laws.

This Circuit has embraced the *Singer* holding, at least in the context of patent infringement suits. In *Handgards, Inc.* v. *Ethicon, Inc.*, 601 F.2d 986, 994 (9th Cir. 1979), *cert denied*, 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980), this court stated that:

> *Kobe* [*Kobe, Inc.* v. *Dempsy Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837, 73 S.Ct. 46, 97 L.Ed. 651 (1952)] and its progeny, among which is *Rex Chainbelt* [*Rex Chainbelt, Inc.* v. *Harco Products, Inc.* 512 F.2d 993 (9th Cir.), *cert. denied*, 423 U.S. 831, 96 S.Ct. 52, 46 L.Ed.2d 49 (1975)], hold that a patentee may incur antitrust liability for even the good faith prosecution of a valid patent where it is shown that the infringement suit "was brought in furtherance and as an integral part of a plan to violate the antitrust laws." 601 F.2d at 994. (Citations omitted). *See also Mach-Tronics, Inc.* v. *Zirpoli*, 316 F.2d 820, 830-31 (9th Cir. 1963).

The fact that the Ninth Circuit cases involving enforcement litigation as an integral part of an overall scheme which violates the antitrust laws arise in the context of patent litigation does not intimate that such a theory is only viable in the patent context.[35] We see no reason for refusing to extend the rationale of these patent-antitrust cases to overall antitrust schemes in other contexts.

The Tenth Circuit has extended the *Singer* doctrine to protests involving the ICC. In *Webb v. Utah Tour Brokers Association*, 568 F.2d 670 (10th Cir. 1977), the Tenth Circuit held that antitrust liability attached to tour operators who used protests to the ICC as a means to further an illegal boycott. In finding liability the *Webb* court stated:

> It is apparent that in the case at bar the trial court was correct in recognizing that the activities of the defendants went far beyond the use of legal procedures in order to protect the public interest. The activities here were designed to and succeeded in bringing about a boycott of the plaintiffs, which reduced their competitive significance and caused a substantial loss.

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35. Rather, it is indicative only of the uneasy, but recurring, interplay between patent law, which authorizes monopolies, and antitrust law, which prohibits and punishes monopolies. *See Handgards*, 601 F.2d at 992 n.10.

> Accordingly, we must conclude that the governing law is that set forth in the boycott cases rather than the exemption decisions in *Noerr Motor Freight, Inc.* and its progeny. *Id.* at 676.

The defendants contend, however, that *Noerr-Pennington* protects petitioning activity even if it is a part of an independent antitrust violation. As support, defendants cite *Pennington:* "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593.

Contrary to the defendants' assertions, this statement does not provide them with *Noerr* immunity for an overall and independent antitrust violation. This statement, rather, provides immunity only for the narrow petitioning activity, if done with the requisite intent to influence government action. Clipper, in this cause of action, is not challenging merely the petitioning activity. Rather, it challenges the defendants' entire course of conduct, which allegedly resulted in the price fixing and trade restraints. No one has contended that the alleged price-fix conspiracy was intended to influence governmental actions. The defendants' actions do not enjoy immunity, even though a part of the actions may have involved protected first amendment petitioning. The reach of the *Noerr-Pennington* doctrine is not that extensive, and the antitrust laws are not that impotent.

Clipper, aided by the judicial admissions of the defendants, has established that defendants conspired to fix prices and restrain trade, and that this conspiracy was in part enforced by protests to the ICC. Clipper has therefore stated a claim for relief as a matter of law. The defendants contend, however, that whatever conspiracy they engaged in was protected by § 5a of the ICA. Section 5a of the ICA provides immunity from the antitrust laws for collective rate agreements in certain circumstances. In ruling on the defendants' summary judgment

motion, the district court did not determine whether such circumstances existed here. Clipper, in its briefs, contends that there was no such ICA immunity here. On the record this court is not in a position to determine the existence of § 5a immunity. That determination involves the resolution of disputed issues of fact, including the need for ICC approval of questioned rates, the existence of ICC approval of the rate bureau agreement, the extent of any such approval, and, assuming approval, the existence of any activities by the defendants beyond that approval. We therefore remand this issue to the district court to determine whether the defendants' activities enjoyed § 5a immunity for the alleged conspiracy to price-fix and restrain trade.

DAMAGES

Clipper alleged that the defendants' conduct caused Clipper to be damaged in the amount of thirty million dollars, and it asked for treble that amount. Clipper's damage claim rests on three distinct theories: (1) once Clipper published and defendants protested the $1,056 rate, Clipper was effectively barred from publishing its $842 rate until the investigation of the $1,056 rate was resolved in Clipper's favor—two years later. Clipper seeks the damages resulting from the two-year delay in publishing the $842 rate; (2) Clipper seeks to recover costs incurred in defending against defendants' sham protests;[36] and (3) the ICC investigation of the $1,056 rate, caused by the defendants' protests, placed a "cloud" on the legality of that rate during the time it was under investigation. Shippers will not generally use a rate when it is under investigation. Clipper seeks to recover for the business lost or deterred by this cloud.

Defendants respond that Clipper's damage claim is barred by *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47.

36. In their brief, defendants contend that Clipper's costs in defending against the protests were quite small, and they imply that because they were small, they are noncompensatory. We are not here concerned with the amount of damage. That is a question for the trier of fact. Our sole concern is whether the theory on which damages are claimed is viable.

67 L.Ed. 183 (1922)[37] The district court agreed with the defendants, holding: "Furthermore, plaintiff's damage claims, which rest on assumptions as to action that would have been taken by the ICC in the absence of defendants' alleged antitrust violations, are barred by *Keogh v. Chicago & N.W. Ry. Co.* . . ." (citation omitted). We disagree.

In *Keogh* a shipper sued several carriers, alleging that the carriers had conspired to set arbitarily high rates, and that this conspiracy violated the antitrust laws. The plaintiff claimed that the rate filed by the carrier defendants was illegal, even though the rate had received ICC approval. Plaintiff sought as damages the difference between the rate which had received ICC approval and some hypothetical, unset rate that would have been in effect, absent the conspiracy. The Court held that no antitrust action was stated; the exclusive remedy was held to be contained in the Act to Regulate Commerce (now the ICA). The Commerce Act provided for a damage recovery with illegal rates. The court further noted that the challenged rate was legal, having received ICC approval. They also noted that judicial antitrust relief here would frustrate the intent of Congress—Congress having passed the Commerce Act to insure

37. Defendants also contend that Clipper's damage claim is not compensable because Clipper caused its own injury by deliberately adopting a piecemeal filing strategy before the defendants undertook to protest. It is clear that the only antitrust damages that are recoverable are those which are caused by the defendants' illegal conduct. *See Kapp* v. *Nat'l Football League,* 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). This causation problem, however, is properly determined by the trier of fact. Whether defendants' acts damaged Clipper, and the extent of that damage, is not before us at this time.

The defendants also contend that because RMMTB and not the individual motor carrier defendants filed the protests, only RMMTB could have any liability. The defendants contend that for a member of an association to be liable for an association's acts in violaton of antitrust laws the member must have "knowlingly, intentionally and actively participated in an individual capacity in the scheme." *Kline* v. *Coldwell, Banker & Co.,* 508 F.2d 226, 232.

The liability of the individual defendants is not now before this court. Our sole concern at this time is whether a triable cause of action is stated. If so, it will be up to the trier of fact to determine, under the applicable law, which defendants are liable, and the extent of that liability.

uniform rates. Judicial relief would result in a lower rate to plaintiff than to other shippers, and thus be a discriminatory rebate. Finally, the court noted that judicial relief here would require the court to speculate on the level the rate would have been set by carriers and approved by the ICC absent the conspiracy, thereby assuming what ICC action would be.

None of these decisional bases appear in the instant case. *Keogh* is not even arguably applicable as a bar to Clipper's second and third damage claims. Clipper's second damage claim is for the costs of defending against the protests. There is no applicable ICC remedy to recover these costs. An award of these costs by a court would not interfere with the ICC, nor would it be discriminatory. Finally, awarding these damages does not require the court to make any assumptions as to ICC actions.

The same analysis applies to Clipper's third damage claim to recover for profits lost because of the "cloud" on Clipper's rate while it was under investigation. There is no ICC remedy applicable. Awarding damages for this would not interfere with the regulatory framework of the ICC. Finally, although it might be hard to prove these damages, the proof does not require that any assumptions about ICC action be made.

Finally, *Keogh* does not apply to bar Clipper's first damage claim. Clipper claims that it was damaged because the defendants' protests prevented Clipper's filing of the $842 rate for two years. Unlike *Keogh*, there is no remedy under the ICA for Clipper's claim. Moreover, it is not a question of a challenge to the legality of a rate approved by the ICC. Here, the claim is that defendants' actions delayed for two years the filing of a rate—which the ICC ultimately approved. Relief here would not disturb any uniform rates; it would do nothing to ICC-approved rate structure. Finally, judicial relief here would not involve the speculation that was at issue in *Keogh*. In *Keogh* there was no evidence of what the legal ICC approved rate would be absent the conspiracy. Here the allegations indicate that Clipper would have filed an $842 rate, and the

subsequent ICC approval suggests that rate might have been approved two years earlier. Of course, there is no certainty the rate would have been approved. The speculation involved in the instant case, however, in no way approaches the degree of speculation disallowed in *Keogh*. There is, therefore, no reason to find that *Keogh* bars this damage claim.

There are a myriad of cases that deal with the interplay of regulation and antitrust law.[38] None of these cases precludes Clipper's damage claim. These cases have been careful to note that courts should not displace antitrust law for regulation, in the absence of a clear conflict between antitrust law and regulation. There is no clear conflict here between antitrust and regulation. We therefore find that there is a damage remedy for the antitrust violation.

REVERSED and REMANDED.

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38. *See, e.g., Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (when agency (CAB) had power to approve monopolistic practice and did in fact approve the practice, no antitrust action would lie); *Far East Conference* v. *United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952) (when challenged conference agreement had been approved by U.S. Shipping Board under authority of Shipping Act of 1916, no antitrust action based on challenge to conference agreement would lie). *See also United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (1932); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

See Keogh v. *Chicago & N. W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922) (ICC vested with pervasive rate setting power; court cannot intervene if it would upset rate structure); *Georgia* v. *Penn. R.R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) (ICC has pervasive power over rate setting; court interference would result in unjust discrimination contrary to Congressional intent; Court noted that ICA does not provide remedies for the correction of *all* of the abuses of rate-making which might constitute violations of antitrust laws.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-72-863 AJZ

Clipper Exxpress, a corporation,
Plaintiff,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., et al.,
Defendants.

[July 27, 1978]

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS

All defendants other than Lee Way Motor Freight, Inc. have filed a single motion for summary judgment. Defendant Lee Way has filed a separate motion for summary judgment, as well as a motion to dismiss for insufficient service of process.

With regard to the motions for summary judgment, the issues are purely legal ones. Plaintiff's claim, insofar as it is based on defendants' protests before the Interstate Commerce Commission, is barred by the doctrine developed in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). Plaintiff's attempt to invoke the "sham" exception to that immunity, as defined in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), is, under the undisputed facts in this case, foreclosed by the narrow reading of that exception announced in *Franchise*

Realty Interstate Corp v. *San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir.), *cert. denied*, 430 U.S. 940 (1977).

Furthermore, plaintiff's damage claims, which rest on assumptions as to action that would have been taken by the ICC in the absence of defendants' alleged antitrust violations, are barred by *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922).

All defendants are therefore entitled to summary judgment in their favor. Moreover, the motion of Lee Way for dismissal for insufficient service of process must also be granted in view of the circumstances under which that defendant entered this lawsuit.

IT IS THEREFORE ORDERED that the motions of all defendants for summary judgment are granted.

IT IS FURTHER ORDERED that the motion of defendant Lee Way for dismissal for insufficient service of process is granted.

Dated: July 27, 1978

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix C
District Court's Order Denying Motion to Vacate Judgment

C-45

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-72-863 AJZ

Clipper Exxpress, a corporation,
Plaintiff,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., et al.,
Defendants.

[October 13, 1978]

ORDER DENYING MOTION TO VACATE JUDGMENT

On September 14, 1978, this court heard the motion of plaintiff to reconsider the court's order of July 27, 1978, granting motions for summary judgment and to vacate the judgment entered pursuant to that order on July 31, 1978. At the hearing of said motion the Interstate Commerce Commission was granted leave to appear as amicus and to argue in support of plaintiff's motion.

After having heard and considered the arguments of counsel and the papers and briefs filed in support thereof, and being fully advised in the premises, the court remains of the view that plaintiff's attempt to invoke the "sham" exception to the immunity doctrine developed in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), is foreclosed by the Ninth Circuit's reading of that exception in *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Work-*

ers, 542 F.2d 1076 (9th Cir.), *cert. denied,* 430 U.S. 940 (1977). Such narrow reading of the exception relied upon by plaintiff was recently approved in *Mark Aero, Inc.* v. *Trans World Airlines, Inc.,* 1978-2 Trade Reg. Rep. (CCH) ¶ 62,135 (8th Cir., July 6, 1978), wherein the court said:

> . . .All of these actions are joint efforts to influence governmental action. As such they fall within the *Noerr* umbrella and cannot give rise to Sherman Act liability.
>
> It matters not that the sole purpose alleged to underlie the attempt to influence governmental action was to hamper a competitor's business activities. . . .

Id. at 75,006.

> . . .In the case before us it is alleged that the defendants have engaged in a publicity campaign involving the media and various citizens groups, that they have induced the Aviation Department of the City to refuse to make application to the FAA for approval of a master security plan, that they have made and induced others to make false and misleading statements to, and used "economic coercion" on, the City Council. These actions may all be admitted, and we take them as true, but what is being complained about is genuine political activity, protected by the first amendment rights of free speech and freedom of petition.[35] . . . [Footnote 35 is a specific reference to and approval of *Franchise Realty Interstate Corp.*]

Id. at 75,007.

IT IS HEREBY ORDERED that the motion to vacate the summary judgment entered on July 31, 1978, is denied.

Dated: October 13, 1978

/s/ ALFONSO J. ZIRPOLI

United States District Judge

Appendix D
Court of Appeals' Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-3684
D.C.No. C-72-863 AJZ

Clipper Exxpress, a corporation,
Plaintiff-Appellant,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., Yellow Freight Systems, Inc., Consolidated Freightways Corporation of Delaware, Illinois-California Express, Inc., IML Freight, Inc., Pacific Intermountain Express Co., T.I.M.E.—D.C., Inc., Consolidated Copperstate Lines, Garrett Freight Lines, Inc., Navajo Freight Lines, Inc., N.W. Transport Service, Inc., Ringsby Truck Lines, Inc., Rio Grande Motor Way, Salt Creek Freight Ways, Transcon Lines, United Buckingham Freight Lines and Western Gillette, Inc.,
Defendants-Appellees.

[October 6, 1982]

ORDER

Before: WALLACE and ALARCON, Circuit Judges
and von der HEYDT,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable James A. von der Heydt, Chief United States District Judge, District of Alaska, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Opinion (Slip op. April 19, 1982 at p. 1580) is amended as follows:

At Slip op. p. 1590, second column, line 25 (first indented quotation), after said quotation add:

. . . .

> Again, for the purpose of this motion, the court may accept Clipper's allegations as fact and assume that defendants expressly agreed among themselves not to cut rates to divert traffic from one another—or to put it more bluntly, that they agreed that their rates would be exactly the same. Such an agreement would be perfectly lawful and immunized from antitrust liability.

. . . .

At Slip op. p. 1598, the following should be added to Footnote 25:

> Our view that a single sham action is sufficient is not inconsistent with the holding in *Ad Visor, Inc.* v. *Pacific Telephone & Telegraph Co.*, 640 F.2d 1107 (9th Cir. 1981). In *Ad Visor,* we stated "Multiplicity, by itself, does not vitiate the *Noerr-Pennington* protections." *Id.* at 1109.
>
> In support of this view, we relied upon the following language from Justice Blackman's [sic] concurring opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 2881, 33 L.Ed. 1009 (1977): "Since I believe that federal courts should be hesitant indeed to enjoin ongoing state court proceedings, I am of the opinion that a pattern of *baseless,* repetitive claims or *some equivalent showing* of

grave abuse of the state courts must exist before an injunction would be proper." 433 U.S. at 644 (emphasis added).

Thus, it is not the number of claims which is controlling, but whether the evidence shows that the claim or claims filed constitute an abuse of process. Where the facts are in dispute, this is a question for the trier of fact.

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

49 U.S.C. § 10708(a)(1) provides as follows:

> (a)(1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately, on its own initiative or on application of an interested party when—
>
> > (A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier, under this subtitle; or
> >
> > (B) a new or reduced rate or rule or practice that causes a reduction of a rate is filed with the Commission by a contract carrier under this subtitle.

49 U.S.C. § 10761(a) provides as follows:

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that

rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762(a)(1) provides as follows:

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Appendix F

Conflicting Decisions on the Sham Exception to Noerr-Pennington Immunity

F-52

I. "Pattern of Repetitive Claims" Requirement

"[W]e hold that a single suit, or in this case a single protest, is sufficient to invoke the sham exception."
—*Clipper Exxpress,* App. A, p. A-23, 674 F.2d at 1267

A. CASES REQUIRING MORE THAN A SINGLE SUIT OR PROTEST TO INVOKE SHAM EXCEPTION.

1. *Mid-Texas Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 615 F.2d 1372, 1384 n.9 (5th Cir.), *cert. denied,* 449 U.S. 912 (1980):

"[Plaintiff] has not alleged a consistent pattern whereby [defendant] refused interconnection requests in all cases and then raised points of procedure for the purposes of delay before the FCC.... Thus, the situation is unlike [*Trucking Unlimited*]...."

2. *Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir. 1977) (per curiam):

"This was the only suit initiated by defendants-appellees then or later against the plaintiff.... This case is clearly distinguishable from [*Trucking Unlimited*]."

3. *Johns-Manville Corp.* v. *Guardian Industries, Corp.*, 1981-1 Trade Cases ¶ 64,054, at 76,426-427 (E.D. Mich. Apr. 27, 1981):

B. CASES STATING THAT A SINGLE SUIT OR PROTEST IS SUFFICIENT TO INVOKE SHAM EXCEPTION.

1. *Feminist Women's Health Center, Inc.* v. *Mohammed,* 586 F.2d 530, 542 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1979):

"[A] triable issue of fact remains as to whether the [defendants' single] letter of complaint ... was but a sham effort to influence government action."

2. *Sage International, Ltd.* v. *Cadillac Gage Co.*, 507 F. Supp. 939, 946 (E.D. Mich. 1981):

"[T]he better view is that there is no *per se* requirement of successive ill-founded suits to support a sham litigation claim."

3. *First National Bank of Omaha* v. *Marquette National Bank of Minneapolis,* 482 F. Supp. 514, 520 (D. Minn. 1979), *aff'd,* 636 F.2d 195 (8th Cir. 1980), *cert. denied,* 450 U.S. 1042 (1981):

"[O]ne lawsuit may be sufficient in some cases to bring a defendant's conduct within the 'sham exception'....

"[D]efendants' allegations do not fit the sham exception; they do not allege anything approaching [a] pattern of abusive litigation . . . . "

4. *Reaemco, Inc.* v. *Allegheny Airlines,* 496 F. Supp. 546, 557 (S.DN.Y. 1980):

"[T]here is no allegation that defendants engaged in a repetitive pattern of conduct . . . . Thus [plaintiff] cannot invoke the sham exception . . . . "

5. *S. M. Arnold, Inc.* v. *Union Carbide Corp.,* 487 F. Supp. 1182, 1184 (E.D. Mo. 1980):

"The absence of an alleged repetitive pattern of sham litigation . . . serves to reinforce the Court's determination that plaintiffs acted in good faith as a matter of law."

6. *Mountain Grove Cemetary Association* v. *Norwalk Vault Co. of Bridgeport, Inc.,* 428 F. Supp. 951, 955-56 (D. Conn. 1977):

"If the institution of a single lawsuit could be the predicate for an antitrust violation . . . then no business organization could seek a judicial determination of its rights *vis-a-vis* a competitor without assessing the antitrust implications of its contemplated legal action."

4. *Technicon Medical Information Systems Corp.* v. *Green Bay Packaging, Inc.,* 480 F. Supp. 124, 127 (E.D. Wis. 1979):

"[T]he bringing of one lawsuit in bad faith or without probable cause is sufficient to bring the action within the sham exception . . . . "

5. *Colorado Petroleum Marketers Association* v. *Southland Corp.,* 476 F. Supp. 373, 379-80 (D. Colo. 1979):

"[We] conclude that a single lawsuit can provide the basis for invoking the 'sham exception' . . . . "

6. *Outboard Marine Corp.* v. *Pezetel,* 474 F. Supp. 168, 175 n.9 (D. Del. 1979):

"[T]he Supreme Court has strongly suggested that one harassing piece of litigation may be enough to invoke the protection of the antitrust laws under the [sham] exception."

7. *Cyborg Systems, Inc.* v. *Management Science America, Inc.,* 1978-1 Trade Cases ¶ 61,927, at 73,918

7. *Strategic Marketing Services, Inc.* v. *Cut & Curl, Inc.*, 1977-2 Trade Cases ¶ 61,788, at 73,243 (D. Conn. Dec. 22, 1977):

"As defendants contend, the bringing of a single lawsuit, even for an anti-competitive purpose, is not actionable under the antitrust laws."

8. *Central Bank of Clayton* v. *Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd without op.*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977):

"In the instant case, there was only *one* lawsuit."

9. *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966, 970 (E.D. Pa. 1975):

"Here, we are not faced with a pattern of litigation, but with *one* lawsuit . . . . "

"These opinions [in *Vendo Co.*] suggest that a majority of the Court would find that the sham litigation exception can be applied to a case involving only one lawsuit."

8. *Associated Radio Service Co.* v. *Page Airways, Inc.*, 414 F. Supp. 1088, 1096 (N.D. Tex. 1976), *aff'd*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981):

"Defendants urge that filing one state suit . . . is insufficient as a matter of law to constitute abuse of the legal process . . . . [However,] plaintiff need only show that the Defendant instituted litigation with the *purpose* of achieving a collateral and unlawful objective . . . . "

C. CASES LEAVING OPEN THE ISSUE WHETHER A SINGLE LAWSUIT INVOKES SHAM EXCEPTION.

1. *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1177 (10th Cir. 1982):

"[W]e need not address ourselves here to the further question as to whether a *single* sham lawsuit is sufficient basis for a subsequent antitrust action . . . ."

II. Test of "Baselessness"

"[T]he fact that defendants lost all protests[1] establishes a sufficient showing of baselessness."

—*Clipper Exxpress*, App. A, p. A-23, 674 F.2d at 1267

A. CASES HOLDING THAT LACK OF ULTIMATE SUCCESS ON THE MERITS DOES NOT ESTABLISH BASELESSNESS.

1. *Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980):

"[Plaintiffs'] argument that some of these proceedings could only delay and not ultimately defeat [plaintiffs' proposed] construction of the shopping mall [does] not render those efforts frivolous."

2. *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1363-64 (D.D.C. 1981):

B. CASES HOLDING THAT LACK OF ULTIMATE SUCCESS ON THE MERITS MAY ESTABLISH BASELESSNESS.

1. *Ernest W. Hahn, Inc.* v. *Codding*, 615 F.2d 830, 841 (9th Cir. 1980):

"Another factor we rely upon is that each one of the various lawsuits has been decided against [defendant]. This certainly is the hallmark of insubstantial claims . . . ."

2. *Baxter Travenol Laboratories, Inc.* v. *Le May*, 536 F. Supp. 247, 252 (S.D. Ohio 1982):

1. The Court of Appeals having assumed that "all protests" were equivalent to a single protest, this statement applies to loss of a single protest. App. A, pp. A-18-A-19, 674 F.2d at 1265.

"[T]he evidence shows little more than that . . . the FCC ultimately ruled against Bell. The sham exception . . . must be narrowly construed so as not to chill the rights of individuals and corporations to access to courts and to legislative and regulatory bodies. This principle would be hindered by a ruling which exposed an entity to antitrust liability on the basis that an official body found its contentions to be . . . without merit."

C. CASES HOLDING THAT ULTIMATE SUCCESS ON THE MERITS ESTABLISHES THAT LITIGATION ACTIVITIES WERE NOT BASELESS.

1. *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir. 1977)(per curiam):

"The record clearly discloses that they prevailed in that litigation . . . . This case is clearly distinguishable from [*Trucking Unlimited*]."

2. *Horseman's Benevolent & Protection Association v. Pennsylvania Horse Racing Commission*, 530 F. Supp. 1098, 1110 (E.D. Pa. 1982):

"[T]here are no specific factual allegations of sham activity . . . . On the contrary, the gravamen of the complaint is that the [defendant] . . . was successful in influencing the Commission. . . ."

"[T]he termination of the litigation in favor of the antitrust plaintiff, while not a rigid requirement in all circumstances, is strong evidence, and probably dispositive of, the issue of the allegedly 'baseless' nature of litigation."

D. CASES HOLDING THAT ULTIMATE SUCCESS ON THE MERITS DOES NOT ESTABLISH THAT PROTEST OR SUIT WAS NOT BASELESS.

1. *Sunergy Communities, Inc. v. Aristek Properties, Ltd.*, 535 F. Supp. 1327, 1331 (D. Colo. 1982):

"[S]uccess is, in any event, only one factor to consider in determining whether an action is a 'sham' . . . ."

2. *Ross v. Bremer*, 1982-2 Trade Cases ¶64,746, at 71,618 (W.D. Wash. March 16, 1982):

"This court does not believe that success alone can be considered determinative that a course of lawsuits will be protected under *Noerr-Pennington*."

3. *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 (D. Del. 1979):

"[Plaintiff] argues that the fact that [it] was successful before the agency . . . takes [it] out from under . . . the 'sham' exception . . . . [There is no support for] plaintiff's position . . . ."

3. *Town of Massena* v. *Niagara Mohawk Power Corp.*, 1980-2 Trade Cases ¶ 63,526, at 76,818 (N.D.N.Y. Sept. 8, 1980):

"[Defendant] was successful in this action and the lawsuit may not therefore be characterized as a 'sham.' "

E. CASES HOLDING THAT LACK OF PROBABLE CAUSE TO SUE OR PROTEST DOES NOT ESTABLISH BASELESSNESS.

1. *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1176 (10th Cir. 1982):

"[T]he term 'sham' is something more than a mere 'absence of probable cause.' "

F. CASES HOLDING THAT LACK OF PROBABLE CAUSE TO SUE OR PROTEST ESTABLISHES BASELESSNESS.

1. *Mid-Texas Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 615 F.2d 1372, 1384 n.10 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980):

"[Plaintiff must prove] that [defendant] opposed [plaintiff's] informal complaint before the FCC and demanded a hearing without any probable cause and totally regardless of the merits . . . ."

2. *Chest Hill Co.* v. *Guttman*, 1981-2 Trade Cases ¶ 64,417, at 75,055 (S.D. Ohio May 29, 1981):

"The test, then, in determining whether the antitrust defendants have engaged in a 'pattern of baseless claims' . . . is whether they had probable cause in filing the claims."

3. *S. M. Arnold, Inc.*, v. *Union-Carbide Corp.*, 487 F. Supp. 1182, 1184 (E.D. Mo. 1980):

"Defendant has misconstrued the ... 'sham exception'.... Without now addressing the merits of plaintiffs' complaint, it may be noted that it was not made without probable cause."

G. CASES EMPLOYING A "GENUINE DISPUTE," "LEGITIMATE CONCERN," OR "REASONABLE BASIS TO SUE OR PROTEST" TEST OF BASELESSNESS.

1. *Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1200 (8th Cir. 1982):

"[W]e cannot say that the legal claims... were so groundless as to come within the 'sham litigation' exception.... There were genuine disputes regarding... solicitation methods."

2. *Landmarks Holding Corp.* v. *Bermant*, 664 F.2d 891, 897 (2d Cir. 1981):

"[T]he defendants had no reasonable basis for their appeals from the decision of the [city planning and zoning commission]...."

3. *WIXT Television, Inc.* v. *Meredith Corp.*, 506 F. Supp. 1003, 1032 (N.D.N.Y. 1980):

"[Defendant's] reasons for objecting to plaintiff's application are far from... 'baseless'.... the possible 'ghosting' problem caused by the new antenna was a 'legitimate concern' to plaintiff's competitors."

4. *City of Newark* v. *Delmarva Power & Light Co.*, 497 F. Supp. 323, 327 (D. Del. 1980):

"Because plaintiffs purchase electric power at wholesale from [defendant], they clearly have a legitimate interest in defendant's wholesale tariff proceedings before the Commission."

5. *Pennwalt Corp.* v. *Zenith Laboratories, Inc.*, 472 F. Supp. 413, 424 (E.D. Mich. 1979), *appeal dism'd without op.*, 615 F.2d 1362 (6th Cir. 1980):

"There has been nothing to suggest that [plaintiff] did not have valid claims against the [defendants] who have been joined in this lawsuit .... This is not what is meant by a sham."

6. *Foret* v. *Point Landing, Inc.*, 1976-2 Trade Cases ¶ 61,106, at 70,012 (E.D. La. Oct. 1, 1976):

"[Defendant's] applications were a part of a legitimate protection of its interests. . . ."

III. Requirement of "Access-Barring"

"We have found no precedent nor any reason to require access barring before the sham exception can be invoked."
—*Clipper Exxpress*, App. A, p. A-27, 674 F.2d at 1269

A. CASES REQUIRING ACCESS BARRING BEFORE SHAM EXCEPTION IS INVOKED.

1. *Federal Prescription Service, Inc.* v. *American Pharmaceutical Association*, 663 F.2d 253, 262 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1293 (1982):

"What is needed . . . is proof that the [defendants] . . . effectively barred [plaintiff's] access to these [governmental] processes . . . ."

2. *Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980):

" '[A]ccess-barring is the cornerstone to the sham exception.' "

B. CASES HOLDING THAT ACCESS BARRING IS NOT REQUIRED TO INVOKE SHAM EXCEPTION.

1. *Ernest W. Hahn, Inc.* v. *Codding*, 615 F.2d 830, 841 n.14 (9th Cir. 1980):

"It has been suggested that *Franchise Realty* requires a showing . . that the plaintiff has been barred from meaningful use of the agency or tribunal. . . . [W]e decline to follow this interpretation . . . ."

2. *Outboard Marine Corp.* v. *Pezetel*, 474 F. Supp. 168, 178 (D. Del. 1979):

"None of the cases . . . appear to concur with plaintiff's interpretation that the 'sham' exception can only be successfully

3. *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 982-83 (7th Cir. 1980), *cert. denied*, 450 U.S. 960 (1981):

"As in [*Trucking Unlimited*], the [plaintiffs] . . . are being denied effective access to timely consideration by the federal commission . . . ."

4. *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978):

"[W]hat is being complained about . . . . [does not] 'bar access' in the sense employed in [*Trucking Unlimited*].

5. *Webb* v. *Utah Tour Brokers Association*, 568 F.2d 670, 674 (10th Cir. 1977):

"[U]tilization of the court or the administrative agency to the extent of monopolizing the available process could constitute a sham."

6. *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 232 (7th Cir. 1975):

"Allegations that the council or its committees did not hold hearings do not amount to allegations of effective denial of access to the city council."

7. *United States v. American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1362-64 (D.D.C. 1981):

"[T]he sham exception is not satisfied by a mere invoked when literal exclusion from the agency proceedings has occurred."

showing of anticompetitive intent . . . there must also be proof that those being charged . . . effectively barred access to [governmental process] . . . ."

8. *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 995 (S.D.N.Y. 1981):

"[T]he key to the sham exception . . . is barring a competitor 'from meaningful access to adjudicatory tribunals . . . .' "

9. *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1033 (N.D. N.Y. 1980):

"The mere allegation of denial of access . . . does not remove this [First Amendment] shield, especially where plaintiff has been given every opportunity to pursue its rights before the very same government agency it asserts it has been denied access to."

10. *Yellow Atlantic Container Line*, 498 F. Supp. 105, 110 (E.D. Mo. 1980), *aff'd*, 668 F.2d 350 (8th Cir. 1981), *cert denied*, 102 S. Ct. 2039 (1982):

"There is no allegation that the plaintiff's access . . . has been barred or impeded in any way. In fact, plaintiff alleges that it is currently a party to [the Commission proceedings]."

11. *City of Newark v. Delmarva Power & Light Co.*, 497 F. Supp. 323, 327 (D. Del. 1980):

"[Plaintiffs] are not alleged to have impeded [defendant's] access to the Commission or indeed to have done anything other than participate on an adversary basis before the Commission in accordance with its rules."

12. *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 556 (S.D.N.Y. 1980):

"The core element of this ... sham exception ... is the effective exclusion of a party from access to the decision-making process."

13. *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cases ¶ 63,526, at 76,818 (N.D.N.Y. Sept. 8, 1980):

"[F]ar from denying [plaintiff] free and unlimited access... the defendant has compelled [plaintiff] to fully avail itself of these adjudicatory processes...."

14. *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F. Supp. 514, 521 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1982):

"[P]laintiffs have not made any assertion that [defendant]

sought to bar its competitors from meaningful access to adjudicatory tribunals . . . ."

15. *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *aff'd without op.*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983 (1978):

"[A]ccess-barring is the cornerstone to the sham exception."

16. *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd without op.*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977):

"Plaintiff was *not* effectively barred from access to the agencies and courts . . . ."

17. *First Delaware Valley Citizens Television, Inc. v. CBS, Inc.*, 398 F. Supp. 917, 923-24 (E.D. Pa. 1975):

"If these allegations could be proved . . . they most obviously have not deterred the plaintiff from having free and unlimited access to the FCC."

Office-Supreme Court, U.S.
FILED
FEB 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1110

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., et al.,
Petitioners,

VS.

CLIPPER EXXPRESS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

A. The Facts

Respondent Clipper Exxpress ("Clipper") is a freight forwarder subject to regulation by the ICC. It transports commodities from Chicago and points east thereof to the major cities on the west coast. Petitioners are the Rocky Mountain Motor Tariff Bureau and several of its member motor carriers who collectively hold 80% of the trans-continental surface transportation market. [App. A at 2; CT 609]

In the early 1960s, the freight forwarder industry was dying. As an investigation by the ICC showed, the regulated forwarders' plight was attributable to the unregulated competition of nonprofit shipper associations. *Ex Parte No. 266, Investigation Into the Status of Freight Forwarders,* 339 ICC 711, 792-3 (1971). The Commission urged the forwarders to publish lower rates for their customers in order to survive. *Id.* at 796.

Clipper did precisely what the ICC told it to do. To prevent further traffic losses to unregulated competition and to regain traffic previously lost, Clipper published a reduced "Freight-All-Kinds" tariff, Tariff 55. [CT 2138, 2148-50][1] However, Clipper knew from past experience that petitioners had continuously sought to maintain the rates of freight forwarders above those of motor carriers and that petitioners would take coercive action to maintain that historical spread. [CT 2149] Clipper therefore expected petitioners to protest any reduced tariff, regardless of its legality or competitive justification. [CT 2149] Clipper feared that any unwarranted protests could induce the ICC to suspend or investigate Tariff 55 so, initially, Clipper reduced its rates only partially to decrease the likelihood of ICC action; Clipper planned to further reduce its rates if the Commission ignored petitioners' expected protests. [CT 2138-9; 2149-50]

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[1]Because shipper association charges applied to all commodities of their various members, Clipper structured Tariff 55 as a "Freight-All-Kinds" ("FAK") rate also. An "FAK" rate is available to all shippers, regardless of commodity, and permits the shipper to combine various commodities in the same trailer load.

Despite Clipper's efforts to avert that which it feared, petitioners immediately filed a protest against Tariff 55 and thereafter lodged 16 additional protests against supplements to the tariff. Moreover, during the same period, petitioners filed 68 protests against other forwarder publications. [CT 2139] From the beginning, each of the protests against Clipper's tariffs was filled with baseless and fraudulent claims relating to every factor the ICC might have considered material to its decision: petitioners misstated the applicable charges; petitioners understated motor carrier costs; petitioners overstated the forwarders' costs by approximately 40%; petitioners withheld vital cost data from the ICC; petitioners misstated the scope of the tariff and its effect on their traffic; and petitioners repeatedly cited old ICC decisions which they knew had long since been repudiated. [CT 2093, 2102, 2137, 2157] Petitioners' baseless protests caused the ICC to investigate Tariff 55 for over two years, thereby casting a cloud upon the legality of the rate which made it difficult to sell to shippers.

Fraud infected petitioners' very first protest, filed November 30, 1970, wherein they repeatedly misstated that

> "[T]he proposed reduced FAK rate . . . drastically undercuts the rate structure currently maintained *from and to* these principal points *not only by the motor carriers and railroads,* but also by the freight forwarders. . . . The current proposal is so drastic that it clearly constitutes a destructive competitive practice." (emphasis added)

The truth is that Clipper's charges exceeded petitioners' charges by 16% on identical traffic and this truth was

known to petitioners from the beginning.[2] Petitioners also represented to the ICC in their very first protest:

> "The 1968 Continuous Traffic Study (CTS) shows that 152,943,200 pounds of freight, producing $8,835,214 of revenue moved from Chicago to California points via motor carrier. The average revenue per hundredweight from Chicago was $5.78, as compared to the proposed FAK rate of 352 cents per hundredweight."

This was a deliberate misstatement: petitioners took the combined motor carrier average revenue on both less-than-truckload and truckload traffic to produce the $5.78 per hundredweight figure, making it appear that petitioners' truckload charge was 64% above Clipper's truckload charge. Petitioners knew, however, that Clipper's proposed charge of $1056 per 30,000 lb. trailer was 16% above their charge.[3]

---

[2] RMMTB 1969 TRUCKLOAD TRAFFIC

	No. of Trailers	RMMTB Charge	Clipper Charge	Percentage by Which Clipper Charge Exceeds RMMTB Charge
Eastbound	5,716	$5,950,871	$ 7,137,033	20%
Westbound ...	3,084	2,850,314	3,312,797	16%
	8,800	$8,801,185	$10,449,830	19%

Neither Clipper nor the ICC knew these figures until the protest dated May 10, 1971 had been filed, six months after the tariff had been placed under investigation. Hence the fraud was successful from the outset. The above was taken directly from the pleadings on file in the ICC, which are a proper subject of this Court's judicial notice.

[3] Thus, even if petitioners did not include misrepresentations about *costs* in the initial protest—as they state in footnote 5 of their petition—there was ample fraud regarding actual and proposed *charges* to trigger an investigation. Thereafter, petitioners compounded their sins by introducing a host of fraudulent misrepre-

In the course of discovery, Clipper learned of petitioners' anticompetitive purpose in prosecuting their fraudulent and frivolous protests against Clipper's rates: petitioners have agreed among themselves not to solicit each other's customers by means of competitive rate offers.[4] Petitioners filed their deliberately false protests against Clipper's tariff to protect their illegal customer allocation/rate-fix scheme.

Once the ICC placed Tariff 55 under investigation, Clipper had no choice but to answer each of petitioners' successive protests over the next three years. [CT 2139; 2150] The ICC found in Clipper's favor at every step of the administrative hearing process. Finally, after petitioners had exhausted all ICC procedures in their effort to obstruct Clipper's rate publications by prolonging the ICC's investigation thereof, Clipper was able to meet the rates of unregulated shippers' associations.

B. Proceedings Below

This case is over ten years old and has yet to come to trial. The complaint was filed in May 1972 and, upon petitioners' motion, was stayed for nearly two years until the

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sentations so as to prolong the ICC's investigation of Clipper for over two years. Those misrepresentations are partially described in Clipper's Reply Brief to the Court of Appeals, pages 2-6.

[4]Although petitioners assumed the existence of the illegal customer allocation/rate-fix conspiracy for purposes of their summary judgment, there was also substantial evidence of the conspiracy. See, e.g., Tyler depo. 105; Sloan depo. 18-19 and Ex. 4; Dunlap depo. Exs. 10, 12; Hale depo. Exs. 20, 21; Adams depo. Exs. 1-3, 1-18; Pellochoud depo. 159 and Ex. 6; Davis depo. 39-40; Flannagan depo. 27; Wright depo. 28. This conspiracy was more fully described at pages 33-6 of Clipper's Opening Brief in the Court of Appeals.

ICC issued a final ruling on the legality of Clipper's tariff. [CT 1, 70] The district judge stayed the case pending the ICC determination because, as petitioners then contended, the agency's decision would constitute evidence of whether the protests were sham and filed solely for purposes of harassment. *Clipper Carloading Co. v. Rocky Mountain Motor Tariff Bureau*, 1972 Trade Cases ¶ 74,229 (N.D. Cal. 1972).

In 1978, shortly before trial was to commence, petitioners moved for summary judgment. [CT 1830] To eliminate the myriad factual disputes between the parties, petitioners directed the district court to make several assumptions. As the Court of Appeals stated, "[N]ot once but three times, [petitioners] represented to the district court that it could assume . . . that they had done exactly what Clipper alleged in its complaint." [App. A at 11] Thus petitioners told the courts below:

> "For purposes of this motion, the court may assume the existence of the conspiracy alleged. . . . It may further assume that everything was done that Clipper says was done to further that conspiracy. Indeed, it may assume that the conduct is both enjoinable and subject to criminal sanctions under the Sherman Act.
>
> "Again, for the purpose of this motion, the court may accept Clipper's allegations as fact and assume that defendants expressly agreed among themselves not to cut rates to divert traffic from one another—or to put it more bluntly, that they agreed that their rates would be exactly the same. . . .
>
> "This court may assume for purposes of this motion that the object behind each of the protests was just what Clipper says it was—that the defendants who filed them were simply trying to eliminate or destroy competition." [CT 1830; App. A at 10-11]

Despite these damning presumptions, the district court granted summary judgment in a two-page order that failed to address most of Clipper's claims. [App. B at 43-4] In a thorough and comprehensive opinion, the Court of Appeals reversed the grant of summary judgment and remanded the case for trial.

REASONS FOR DENYING THE WRIT

Petitioners seek interlocutory review of the Ninth Circuit's unanimous reversal of a summary judgment. The Court below held that protests which (admittedly) contain not only spurious claims but also fraudulent misstatements and which are (admittedly) prosecuted in furtherance of a *per se* violation of the Sherman Act for the purpose (admittedly) of "simply trying to eliminate or destroy competition" are not immune from the antitrust laws under the *Noerr-Pennington* doctrine.[5] The Ninth Circuit's decision was plainly correct, well reasoned and fully in accord with the rulings of this Court and other Courts of Appeal. While petitioners carp at selected passages from the opinion below in an effort to conjure up a conflict among the circuits that could induce the Court to grant certiorari, a review of the present record and the applicable law demonstrates that no conflict exists and the writ should be denied.

---

[5] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). See also, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

I

CERTIORARI SHOULD BE DENIED BECAUSE RESOLUTION OF THE ISSUES RAISED IN THE PETITION WILL NOT DECIDE THIS CASE

Preliminarily, the Court must recognize that it could not dispose of this litigation by granting the petition and deciding the three questions it raises: when viewed against the opinion below, the very first page of the petition reveals that Clipper's antitrust claim will remain viable irrespective of the outcome of any proceedings in this Court. Clipper submits that it would be a waste of this Court's certiorari power to intervene in this ten-year-old case prior to trial to study legal niceties that are not dispositive of the case.

Clipper has asserted three distinct grounds of antitrust liability [App. A at 4, 11-12] and the Ninth Circuit validated all of them. [App. A at 18, 33-34, 38-39][6] Yet in this Court, petitioners challenge the panel's holdings on only two of the antitrust liability doctrines invoked by Clipper. Accordingly, regardless of how this Court acts on the first two questions raised by the petition, a trial against petitioners on the third basis of antitrust liability approved

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[6]The first of those doctrines holds that sham litigation for the purpose of delaying or obstructing competitive action constitutes a Sherman Act violation. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1974). The second doctrine states that one who commits fraud upon a court or agency for predatory ends may incur antitrust liability. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). The third doctrine recognizes that litigation prosecuted in furtherance of an antitrust violation may itself constitute an independent violation. *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963).

by the Ninth Circuit is certain. See Rule 21.1(a), Rules of the Supreme Court.

Likewise, the Court of Appeals understood—despite petitioners' repeated efforts to mislead it—that Clipper's damages from petitioners' repetitive protests were comprised of three severable parts, only one of which could arguably be precluded by petitioners' strained interpretation of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). [App. A at 41] Thus even if this Court were to grant certiorari on the third question presented by the petition, a ruling adverse to Clipper could not end the case; Clipper would be entitled to present the remaining components of its damage study to the jury on remand.

Petitioners ask this Court to review part of this case now and (presumably) they will ask the Court to review the balance later, after trial. Clipper submits that such piecemeal review of a single cause of action is unwise and unnecessary. Following the trial, petitioners may request the Court to review the same issues they present now (and any others that may arise) but with the benefit of concrete findings by the trier of fact and a fully developed record.[7]

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[7]That fully developed record will prove many *other* antitrust violations by petitioners, as pled by Clipper. Petitioners have engaged in a conspiracy to harm Clipper and other freight forwarders through numerous devices. Pursuant to that conspiracy, they:

1. Boycotted forwarders by concertedly terminating scores of "409 contracts" (18 U.S.C. § 409).

2. Protested the publication of numerous other motor carriers' rates to serve forwarders.

3. Delayed and impeded southeast territorial expansion of Clipper's operating authority for approximately ten years.

4. Procured discriminatory sweetheart contracts with west coast ocean carriers.

II

THE COURT OF APPEALS' DECISION ON THE "SHAM EXCEPTION" DOES NOT CREATE ANY CONFLICT

Petitioners ask this Court for an advisory opinion as to whether the "sham exception" to *Noerr-Pennington* immunity may be applied where (a) a single protest or lawsuit is filed or (b) the protest's lack of merit is the only evidence of its "baseless" nature or (c) the protest does not bar a plaintiff's access to the administrative tribunal. While the first issue framed by petitioners poses an interesting hypothetical, it is not an issue presented by the record before this Court. Certiorari should therefore be denied.

A. Single Protest

Petitioners go to great lengths to excite the Court's interest in the question of whether a single baseless lawsuit brought for anticompetitive ends is sufficient to invoke the "sham exception." However, in its present posture, this case does not present the Court with a genuine opportunity to decide that issue. Petitioners' "single protest" argument was neither presented to nor passed upon by the district judge. In the district court, petitioners had conceded that Clipper's action "involves not simply a single protest with respect to one particular rate but an alleged

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5. Allocated customers among themselves, resulting in an illegal rate fix.

All of these practices inflicted substantial harm upon Clipper and are the subject of Clipper's damage claim in the Court below. None remotely involves *Noerr-Pennington*. Nor does *Keogh* bar recovery for the lost traffic, increased operating costs, the expense of defending sham litigation, etc., resulting from petitioners' illegal conspiracy. All of these claims must be tried on remand.

pattern of protests." [CT 484] and invited the court to assume that numerous protests were involved: "This court may assume . . . the object behind each of the *protests* was . . . to eliminate or destroy competition." [App. A at 11; CT 1830]

Petitioners could not do otherwise. The uncontradicted record before the lower court revealed a veritable blizzard of protests in the early 1970s. Against Tariff 55 alone, petitioners prosecuted 17 protests and 13 appeals over several years. Additionally, petitioners protested 68 other forwarder transcontinental tariffs, forcing 50 of them to be withdrawn because the forwarders could not afford to defend every one of them on the merits. [CT 609; 302 at 9-13] Clipper had a vital interest in all of those tariffs. [CT 2139]

In the face of this evidence and the assumption which petitioners invited the lower court to make for the purpose of inducing a dismissal without full development of the record, there is plainly no basis for this Court to accept petitioners' belated contention that only a single sham protest is at issue here. The Ninth Circuit assumed the existence of a single protest solely for the purpose of responding to petitioners' "single protest" theory. [App. A at 18-19] However, the panel recognized the presence of the underlying question of fact when it explained, "[w]hether defendants' protests constitute one or multiple claims is a matter of interpretation" and it specifically declined to reach that issue on appeal from the summary judgment. [App. A at 19, n.19] There simply is no factual predicate within this record for a decision on the "single

protest" issue even if it were otherwise deserving of review.[8]

B. Proof of Baselessness

Petitioners question whether their protests' failure on the merits—standing alone—constitutes sufficient evidence of "baselessness" to preclude summary judgment under *Trucking Unlimited*'s expansion of the "sham exception." Again, that question is not presented by either the record before this court or the opinion below. Contrary to what petitioners would lead the Court to believe, in reversing summary judgment the Ninth Circuit rested its opinion on far more "objective evidence" of "baselessness" than each protest's lack of success. Indeed, petitioners invited the Court to assume the "baseless" nature of their protests and further asked the court to assume "the object behind each of the protests was . . . [petitioners] were simply trying to eliminate or destroy competition." [App. A at 10-11; CT 1830] Hence the Ninth Circuit properly ruled:

> "[D]efendants' intent, admitted for the purpose of their motion, was not to induce favorable administrative action from the ICC, but rather saddle Clipper with such onerous regulatory and administrative burdens that it would be forced to withdraw the rates." [App. A at 17]
>
> "The defendants admitted *arguendo* that their protests were filed automatically and without regard to

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[8] In *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), Justice Stevens (on behalf of four justices) unequivocally declared that a "single use of the adjudicatory process" was enough to create a cause of action under the sham exception. 433 U.S. at 661-2. Three other members of the Court suggested their concurrence on this point. 433 U.S. at 635-6, n.6. See also, *MCI Communications Corp. v. American Tel. & Tel. Co.*, 1982-3 Trade Cases ¶ 65,137 at p. 71,409 (7th Cir. 1983).

> merit. This establishes that defendants' protests were baseless for the purposes of the motion [for summary judgment]." [App. A at 23]

Accord, *Trucking Unlimited, supra,* 404 U.S. at 511-12; *Landmarks Holding Corp. v. Bermant,* 664 F.2d 891, 896 (2nd Cir. 1981); *City of Gainesville v. Florida Power & Light Co.,* 488 F.Supp. 1258, 1265-6 (S.D.Fla. 1980).

Moreover, Clipper introduced the affidavits of former ICC Commissioners Webb and Hardin detailing petitioners' numerous misstatements of fact and frequent citation of discredited authorities and the affidavits of Messrs. Chambers, McKean and Day to further document the sham, baseless nature of petitioners' protests. [CT 2093, 2102, 2137, 2157][9] Plainly, between petitioners' judicial admissions and Clipper's sworn submissions, the court below had ample cause to find there was a genuine dispute of fact on the question of "baselessness" sufficient to preclude summary judgment.

C. Access Denial

Finally, in asserting that "access denial" is an essential element of the sham exception, petitioners seize upon one clause from the Court's opinion in *Trucking Unlimited* and out-of-context passages from lower court decisions which have followed *Trucking Unlimited* in an effort to create a conflict where none exists. As a reading of *Noerr* reveals, the hallmark of the sham exception is not "access

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[9]Former Chairman of the ICC, Charles Webb, testified: "I have personally examined each of the protests filed by RMMTB . . . In my opinion, the protests were lacking in candor and fairness." He elaborated, "I can only conclude that the misrepresentations were deliberate and filed for the purpose of misleading the Commission's Board of Suspension." [CT 2105-6]

denial." Rather it is conduct which, though ostensibly directed toward influencing government action, "is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr, supra,* 365 U.S. at 144. Although *Trucking Unlimited* exemplified how administrative protests could be employed to "interfere directly with the business relationships of a competitor" by denying access to the agency, "denial of access" is not the sole means of accomplishing such direct, illegal interference.[10]

It makes no sense to speak of a "denial of access" requirement in a case such as this where—unlike *Trucking Unlimited* and the other cases cited by petitioners—access (for the purpose of acquiring prior administrative/judicial approval of competitive activity) is neither required nor desired. Clipper did not need access to the ICC; as provided by statute, Clipper merely had to publish its tariffs and they would have become effective automatically absent petitioners' sham protests. App. A at 3; 49 U.S.C. § 1005; *Bison Steamship Co. v. United States,* 182 F.Supp. 63 (N.D. Ohio 1960). Petitioners' baseless protests were designed to delay Clipper's competitive efforts in the marketplace and they did so for over two years.

Since *Trucking Unlimited,* this Court has declared on several occasions that baseless court or agency litigation

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[10]Although such proof is not a prerequisite to the sham exception, Clipper was denied free and unlimited access to the ICC's regulatory tariff procedures. To the extent petitioners' concealed fraud corrupted the agency processes, "fair and effective access" to those processes was barred in a very real sense. See *City of Mishawaka v. American Electric Power Co.,* 616 F.2d 976, 982-3 (7th Cir. 1980), cert. den., 450 U.S. 960 (1981); *Israel v. Baxter Laboratories,* 466 F.2d 272, 278 (D.C. Cir. 1972). See discussion of petitioners' fraud on the ICC at pages 3-4, *supra.*

prosecuted—as it was here—for the purpose of *delaying* lawful competitive activity may violate the Sherman Act. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1974); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 405 (1978); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15 (1978). In all of these post-*Trucking Unlimited* cases, the victims of the abuse of the judicial/administrative process were not complaining of "access denial." Indeed, they wanted to avoid "access" to the court/agency but the sham claims precluded the victims from extricating themselves from expensive, time-consuming litigation. This Court did not require proof of "access denial" in any of those cases and the Court of Appeals correctly did not require such proof here. [App. A at 24][11]

There is no conflict among the circuits on the issue of "access denial." In cases where the antitrust plaintiff needed prior access to obtain prior approval from a regulatory body—as in *Trucking Unlimited*—the courts have followed that precedent and required some showing of "access denial." See, e.g., *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (10th Cir. 1978); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. den.*, 430 U.S. 940 (1977). However, in cases where the antitrust plaintiff did not need prior access to obtain prior approval from a regulatory body—as in *Otter Tail, City of Lafayette* and here—the courts have not demanded proof of "access denial" but have been satisfied by proof that sham protests were designed to

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[11]The leading commentators agree that proof of "access denial" is unnecessary. See P. Areeda and D. Turner, *Antitrust Law* ¶ 203b at 41 (1978); R. Bork, *The Antitrust Paradox* at 354 (1978).

delay competitive activity. See, e.g., *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896-7 (2nd Cir. 1981); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 841 (9th Cir. 1980). Accordingly, there is no reason to grant certiorari on the first question presented by the petition.

III

THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW PETITIONERS' FRAUD UPON THE ICC

In the courts below, Clipper introduced substantial evidence of petitioners' fraud upon the ICC. Petitioners do not and cannot deny that fraud. Instead, they merely contend it is protected by the first amendment.

On their motion for summary judgment in the district court, petitioners assumed and the record showed that petitioners' ICC protests were rife with deliberate misrepresentations. [App. A at 31] The record and the admissions also revealed petitioners' motive for misleading the ICC: petitioners sought to induce the Commission to suspend or investigate Tariff 55, a lower rate which threatened the stability of petitioners' customer allocation/rate-fixing scheme. Contrary to what petitioners would lead the Court to believe, their fraudulent tactics *were* successful and caused the ICC to investigate Tariff 55 for over two years, thereby injuring Clipper's ability to compete.[13] Peti-

[13]Clipper is at a loss to understand how petitioners can represent to this Court that the ICC disregarded their fraudulent protests and was not deceived by them. Petitioners filed numerous protests against Clipper's tariffs praying for suspension or investigation of the rates. In reliance upon petitioners' false claims, the Commission provided the relief sought. That the investigation ultimately terminated in Clipper's favor did not ameliorate the substantial harm caused by its pendency. See *Otter Tail, supra*, 410 U.S. at 381.

tioners now ask this Court to grant certiorari to consider whether their first amendment "right" to perpetrate fraud upon a federal agency for anticompetitive purposes has been infringed by the Ninth Circuit.

Applying the teachings of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Court below held that fraudulent protests—like any other predatory act—"can be the basis of antitrust liability, if . . . the other elements of an antitrust claim are proven." [App. A at 30] That decision did nothing more than overrule petitioners' claim of *Noerr-Pennington* immunity "for furnishing with predatory intent false information to an administrative or adjudicatory body" [App. A at 31]; to prove an antitrust violation, however, Clipper must still prove the fraudulent protests were the means used to unreasonably restrain trade. [App. A at 30, 31]

In requesting this Court to grant certiorari on the second question they present, petitioners do not claim the opinion below conflicts with an opinion of any other circuit. Indeed, the research of the panel and respondent reveals that several other antitrust courts—including this Court—have also condemned the submission of fraudulent information to administrative tribunals and withheld *Noerr-Pennington* immunity for such conduct. *Trucking Unlimited, supra*, 404 U.S. at 513; *Israel v. Baxter Laboratories*, 466 F.2d 272, 278 (D.C. Cir. 1972); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-7 (5th Cir. 1971), *cert. den.*, 404 U.S. 1047 (1972).[13]

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[13]The commentators agree. See, R. Bork, *The Antitrust Paradox* at 358-9 (1978) ("Access to judicial and administrative processes may be a constitutional right, but there is no constitutional right

Instead, petitioners simply argue the decision below is "bad law" and "wrongheaded."

The Court's decision in *Walker Process* was sound and the Ninth Circuit's application of the *Walker Process* doctrine to federal agencies other than the Patent Office was proper.[14] In *Walker Process, supra,* 382 U.S. at 177, defendant allegedly obtained a patent "by knowingly and willfully misrepresenting facts to the Patent Office." This Court held that proof of fraud "would be sufficient to strip [defendant] of its exemption from the antitrust laws." Likewise, proof of petitioners' fraud upon the ICC should strip them of the *Noerr-Pennington* immunity accorded genuine efforts to petition administrative tribunals.

The ICC's position in considering a protest is identical to that of the Patent Office in considering a patent application and the same antitrust strictures should therefore be applied Neither agency has sufficient manpower to scrutinize the constant flow of filings and both therefore rely heavily upon the veracity of the parties appearing before them. [App. A at 33, CT 2108-9] Compare *Beckman Instruments Mfg. Co. v. Chemtronics, Inc.,* 439 F.2d 1369, 1378 (5th Cir. 1970) with *Middle Atlantic Conference Agreement,* 283 ICC 683, 689 (1951) and *Rate Bureau Investigation,* 351 ICC 811, 817 (1975), *aff'd, Motor Carriers*

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to make deliberate misrepresentations to such tribunals or to press baseless claims for the ulterior purpose of wreaking economic injury upon a competitor."); P. Areeda and D. Turner, *Antitrust Law* ¶ 204 at 48 ("There certainly is no privilege for misrepresentation to administrative agencies which base their decisions on information provided by the parties."); Note, 86 Harvard L.Rev. 715, 724 (1973).

[14] *Walker Process* "is not a mere patent decision but an antitrust precedent of general applicability." R. Bork, *The Antitrust Paradox* at 353 (1978). See also *Trucking Unlimited, supra,* 404 U.S. at 513.

Traffic Assoc., Inc. v. United States, 559 F.2d 1251 (4th Cir. 1977), *cert. den.*, 435 U.S. 1006 (1978). Indeed, in the Court below, the ICC appeared as *amicus curiae* and (with Clipper) urged the panel to apply the *Walker Process* doctrine so as to vitiate petitioners' claim of *Noerr-Pennington* immunity for their fraudulent submissions to the Commission. [Brief of ICC at 8-13][15]

Petitioners ask this Court to immunize their fraud upon the ICC because—according to petitioners—it occurred in a "legislative-type proceeding." However, as the Commission itself advised the Court, "The forum here was adjudicatory, not political." *Id.* at 19. The rate protests at issue here were quasi-judicial: formal pleadings were filed; set rules of procedure and evidence were controlling; the Interstate Commerce Act and precedents constituting it were applied; and the decisions of the administrative law judge were subject to appellate review. The ICC's Code of Ethics required absolute truthfulness from the advocates, most of whom were attorneys. Hence the warning of *Trucking Unlimited* was apropos: "Misrepresentations, condoned in the political arena are not immunized when used in the adjudicative process." 404 U.S. at 513.[16]

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[15]The Commission feared that "[a] ruling favorable to defendants could undermine the integrity of the Commission's adjudicatory functions, The National Transportation Policy and the regulatory scheme of surface transportation, by sanctioning and, therefore, encouraging deliberate misrepresentation of fact by rate bureaus and other parties to Commission proceedings. . . ." [ICC Brief at 5-6]

[16]*Arizona Grocery Co. v. Atchison T. & S.F. Ry.*, 284 U.S. 370 (1932) and *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) did not hold the disposition of protests was purely a "legislative" process; both cases recognized the ICC plays a dual adjudicative and legislative role in ruling upon contested rates. 284 U.S. at 388-9; 259 U.S. at 291.

Petitioners' fraud upon the ICC was indistinguishable from the fraud upon the Patent Office condemned in *Walker Process*. In refusing to license the practice of fraud upon the ICC, the opinion below correctly followed the decisions of this Court and other circuits. Certiorari should therefore not be granted on petitioners' second question.

IV

THE KEOGH "ISSUE" IS NOT WORTHY OF REVIEW

With the parties in sharp disagreement over the factual bases for Clipper's damage calculations, the Court of Appeals refused to precipitously strike them prior to trial.[17] Although they have yet to examine Clipper's damage expert either in trial or at deposition—and therefore have no factual record to support their argument—petitioners contend Clipper's damage claim is speculative and contrary to *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). The third issue raised by the petition regarding the Ninth Circuit's application of *Keogh* in this case is not only premature, but also insignificant.[18]

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[17]Petitioners have repeatedly mischaracterized Clipper's damage study as resting entirely upon assumptions as to action the ICC would have taken absent their sham protests. However, Clipper's damage expert submitted an affidavit flatly contradicting petitioners' unsupported interpretation. [CT 2157] Inexplicably, the district judge ignored the factual dispute, accepted petitioners' representations and granted summary judgment. [App. B at 44] Understandably, the Court of Appeals reversed.

[18]Indeed, it is questionable whether *Keogh* is good law since *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964) was reversed by this Court, *Carnation Co. v.*

First, as the opinion clearly states, *Keogh* involved only the "legal rights of a *shipper as against carrier* in respect to a rate." 260 U.S. at 163. The other cases cited by petitioners also involved disputes between regulated industries and their customers. See *Arkansas Louisiana Gas Co. v. Hall*, 101 S.Ct. 2925, 2928 (1981); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 453 (1945); *City of Newark v. Delmarva Power & Light Co.*, 467 F.Supp. 763, 765 (D. Del. 1979). However, like the Court below, several courts have consistently held *Keogh* inapplicable to cases where—as here—the regulated antitrust defendant has manipulated rates in such a way as to damage its competitors. *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1178-9 (8th Cir. 1982); *City of Groton v. Connecticut Power & Light Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Essential Communications Systems, Inc. v. Am. Tel. & Tel. Co.*, 610 F.2d 1114, 1121 (3d Cir. 1979); *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391, 406 (N.D. Cal. 1966). With respect to the application of *Keogh*, other Circuits are in accord with the decision below rather than in conflict.

Second, the Court below understood what petitioners stubbornly refuse to acknowledge, i.e., that "*Keogh* is not even arguably applicable as a bar to" two components of Clipper's damage claim. [App. A at 41] Surely one may

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Pacific Westbound Conference, 383 U.S. 213 (1966). Just as in *Keogh*, *Carnation* involved a shipper claiming antitrust damages measured by the difference between earlier, lower rates and later, higher rates set by defendants' illegal agreement. Compare *Keogh*, 260 U.S. at 160 with *Carnation*, 336 F.2d at 653. The Ninth Circuit applied *Keogh* to bar Carnation's damage claim. 336 F.2d at 662. This Court reversed, recognizing the shipper had a valid antitrust damage claim measured by the rate differential. 383 U.S. at 219 n.3 and 223-4.

seek damages for expenses incurred in defending against sham litigation. *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979) *cert. den.* 444 U.S. 1025 (1980); *City of Mishawaka v. American Electric Power Co., Inc.*, 616 F.2d 976, 989-90 (7th Cir. 1980). Similarly, any business lost due to the "cloud" of uncertainty surrounding Clipper's tariffs caused by the investigation fraudulently induced by petitioners would be recoverable without making any assumptions about ICC action. [CT 2140][19] Clipper submits it would not be worthwhile for this Court to review only one portion of the damage study before trial or, indeed, before its completion by Clipper's damage expert.

Finally, since *Keogh*, this Court has repeatedly held that antitrust plaintiffs may utilize reasonable assumptions in calculating damages and that any risk of uncertainty befalls the wrongdoer. *Eastman Kodak Co. v. Southern Photo Materials, Inc.*, 273 U.S. 359, 378-9 (1927); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562-5 (1931); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-5 (1945); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Simpson v. Union Oil Co.*, 396 U.S. 13, 16 (1969). There is no reason why this firmly established rule should be suspended for defendants who abuse the processes of a federal agency and who thereby necessitate assumptions as to what the agency would have done but for such abuse. *In re Multidistrict Litigation Involving Frost Patent*, 398 F.Supp. 1353, 1369 (D. Del. 1975).

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[19]Moreover, all of the damages resulting from the conduct described in fn. 7, *supra*—including Clipper's claims for petitioners' boycott, harassing protests, market exclusion, discriminatory contracts, customer allocation, etc.—do not remotely involve *Keogh*.

Petitioners' interpretation of *Keogh* is erroneous, not the decision below. Accordingly, certiorari on the petition's third question should be denied.

CONCLUSION

With respect to the issues they raise, petitioners are requesting advisory opinions on hypothetical facts not before the Court: this case involves more than a single protest; there is ample evidence of the protests' baseless, fraudulent nature; the ICC did not disregard petitioners' protests but instead provided the relief sought; the multi-faceted damage claim does not rest upon speculative assumptions about action the ICC would have taken absent petitioners' antitrust violations. For this and all of the other reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 31, 1983

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1110

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., YELLOW FREIGHT SYSTEMS, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS INC., IML FREIGHT INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E.—D.C. INC., CONSOLIDATED COPPERSTATE LINES, GARRETT FREIGHT LINES, INC., NAVAJO FREIGHT LINES, INC., N.W. TRANSPORT SERVICE, INC., RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, SALT CREEK FREIGHT WAYS, TRANSCON LINES, UNITED BUCKINGHAM FREIGHT LINES AND WESTERN GILLETT, INC.,

Petitioners,

vs.

CLIPPER EXXPRESS,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 82-1110

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., YELLOW FREIGHT SYSTEMS, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS INC., IML FREIGHT INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E.—D.C. INC., CONSOLIDATED COPPERSTATE LINES, GARRETT FREIGHT LINES, INC., NAVAJO FREIGHT LINES, INC., N.W. TRANSPORT SERVICE, INC., RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, SALT CREEK FREIGHT WAYS, TRANSCON LINES, UNITED BUCKINGHAM FREIGHT LINES AND WESTERN GILLETT, INC.,[1]

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[1] Petitioners' parents, subsidiaries and affiliates are listed on page ii of the Petition.

INTRODUCTION

Nothing demonstrates the need for this Court to review the Ninth Circuit's decision better than Clipper's attempt to defend it, not on its merits, but rather on the basis of arguments that the Ninth Circuit itself did not accept. We address Clipper's arguments in order.

ARGUMENT

I. Resolution of the Issues Raised In The Petition Will Dispose of This Case

First Clipper argues that the Petition should be denied because the issues it raises are not dispositive of this case. (R.B. 8-9) Clipper says that even if this Court were to hold that RMMTB's petitioning activity was protected by the First Amendment, there would still have to be a trial because the Court of Appeals "validated" an additional claim by Clipper "that litigation prosecuted in furtherance of an antitrust violation may itself constitute an independent violation." (R.B. 8, n.6)

But Clipper made no such claim, and the Court of Appeals certainly did not "validate" any such claim. As the Court of Appeals stated, Clipper's additional liability theory was that "the defendants engaged in a rate fixing conspiracy, part of which involved defendants' protests to the ICC, and that *this conspiracy constitutes a separate violation of the antitrust laws independent of any petitioning activity that might enjoy Noerr immunity.*" (App. A, p. A-34)[2] That is the claim the Court of Appeals "validated." (*Id.*, pp. A-34-A-39). Far from holding that petitioning activity "in furtherance of [that conspiracy] may itself constitute an independent violation," the Court of Appeals expressly acknowledged this Court's holding in *Pennington* that "*such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.*" 381 U.S. 657 at 670; App. A, p. A-38.[3]

In any event, "validation" of Clipper's "rate fixing conspiracy" theory of liability would not save Clipper's lawsuit if

[2] All emphasis herein is added unless otherwise indicated.

[3] If Clipper were correct about what the Ninth Circuit held, the decision would conflict with *Pennington* in this respect as well, and that would be all the more reason why this Court should review it.

Clipper's other claims fell because the only conduct that Clipper claimed caused it any injury was RMMTB's protest of the Tariff 55 series. This is clear from the Court of Appeals' description of Clipper's damage claim (with which Clipper expressly agrees, R.B. 9):

> Clipper's damage claim rests on three distinct theories: (1) Once Clipper published and defendants protested the $1056 rate, Clipper was effectively barred from publishing its $842 rate until the investigation of the $1056 rate was resolved in Clipper's favor .... Clipper seeks the damages resulting from the two-year delay in publishing the $842 rate; (2) Clipper seeks to recover costs incurred in defending against defendants' sham protests; and (3) the ICC investigation of the $1056 rate, caused by defendants' protests, placed a 'cloud' on the legality of that rate during the time it was under investigation. (App. A, p. A-39)[4]

Thus, if this Court agrees with the District Court and holds that the First Amendment protects RMMTB's protest of the Tariff 55 series, this case will have to be dismissed in its entirety.

However, even if this were not so, the writ still should be granted. Just last year the Court granted certiorari to review an interpretation of the antitrust laws that was not essential to the outcome of the litigation "[b]ecause the Court of Appeals' decision present[ed] an important issue concerning the interpretation of the antitrust laws ...." *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 102 S.Ct. 1935, 1942 (1982).

That is clearly true here. The Court of Appeals' decision on the "sham" exception raises important and recurring antitrust and First Amendment issues. Nearly thirty decisions (many of them confused and conflicting) involving these issues have been rendered during the last two years alone. (Petition

[4] Clipper implies that it also sought to recover damages for other allegedly conspiratorial conduct. (R.B. 9, n.7, 11) Clipper neglects to tell the Court that it specifically either abandoned or admitted that it could show no damages from any such conduct (C.T. 747-48, 776; 1786 ll. 8-20, 1787 ll. 11-15; Docket No. 529, C.T. 2002, p. 47), and that it repeatedly stated that "the gravamen of this action is defendants' repeated and baseless protest of Tariff 55." (Docket No. 529, C.T. 2002, p. 7) As the Ninth Circuit said: "There is one basic Tariff—Tariff 55—involved here." (App. A, p. A-19, n.19).

pp. 10-12; App. F)[5] Additionally, the Court of Appeals' decision in this case takes the "sham" exception farther, at the expense of First Amendment values, than any other decision ever has; it clearly conflicts with decisions both of this Court and of the other courts of appeal. (Petition pp. 10-14) Under these circumstances, certiorari is entirely appropriate.

II. The Court of Appeals' Decision On The "Sham" Exception Is Important To The First Amendment And The Antitrust Laws And Conflicts With Decisions of This Court And Other Courts of Appeals.

Second, Clipper contends that the Petition should be denied because it seeks an "advisory opinion" on merely "hypothetical" issues. Clipper portrays this case as involving (1) "a veritable blizzard of protests" (R.B. 10-11); (2) as to which there was "far more 'objective evidence' of 'baselessness' than each protest's lack of success" (R.B. 12-13); (3) and where "the antitrust plaintiff did not need . . . access to obtain prior approval from a regulatory body." (R.B. 14-15) Therefore, Clipper says, the Court of Appeals' application of the "sham" exception is supported by this Court's decisions in *Trucking Unlimited, Otter Tail,* and *City of Lafayette,* and does not conflict with any other Court of Appeals' decision. (R.B. 12-15)

That is wishful thinking. The decision Clipper has chosen to defend bears no resemblance to the one actually rendered by the Court of Appeals.

A. Single Protest.

The Court of Appeals acknowledged that, practically speaking, there was just one protest involved in this case:

> There is one basic Tariff—Tariff 55—involved here. During the course of the investigation, however, Tariff 55 was modified by Clipper many times. After each modification

[5] Indeed, three more Court of Appeals' decisions interpreting the "sham" exception in different ways have been published since the Petition was filed a month and a half ago. *See, Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.,* 1982-83 Trade Cases ¶ 65,058 (7th Cir. 1982); *MCI Communications Corp.* v. *American Tel. & Tel. Co.,* 1982-83 Trade Cases ¶ 65,137 (7th Cir. 1983) and *Coastal States Marketing, Inc.* v. *Hunt,* 1982-83 Trade Cases ¶ 65,140 (5th Cir. 1983).

> the defendants lodged a new protest. *Each protest was necessary to preserve the initial protest or else the newly revised Tariff 55 would go into effect, mooting the prior protest.* (App. A, p. A-19, n.19)

Therefore, the Court of Appeals assumed "that defendants' acts constituted *one* protest . . . ." App. A, p.p. A-18-A-19. Its holding in this regard could not be clearer: "*we hold that a single suit, or in this case a single protest, is sufficient to invoke the sham exception.*" (App. A, p. A-23)

B. Lack of Success as Proof of Baselessness.

Similarly, the Court of Appeals did not pretend, as does Clipper, that there was any objective evidence of "baselessness" besides the protest's lack of success. To the contrary, the Court of Appeals considered lack of success to be the *only* objective evidence, but held that this alone was enough:

> Here, defendants' protests to Clipper's reduced rates were unsuccessful. This, combined with the assumed facts as to the defendants' intent, is enough to prevent the defendants from being cloaked with *Noerr* immunity as a matter of law. (App. A, p. A-18) [6]
>
> * * *
>
> Indeed, the fact that defendants lost all protests establishes a sufficient showing of baselessness for the purposes of a summary judgment motion. (App. A, p. A-23). [7]

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[6] As the Court of Appeals states, petitioners admitted for purposes of the summary judgment motion that "the object behind each of the protests was just what Clipper says it was—that the defendants who filed them were simply trying to eliminate or destroy competition." (App. A, p. A-11) Petitioners did so because, as the court below acknowledged, "[g]enuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition." (App. A, p. A-17). The Court of Appeals, however, somehow converted this admission into acceptance of *all* of Clipper's allegations of subjective intent, which it clearly was not. The Court of Appeals then compounded its error by holding that defendants' lack of success, combined with "the assumed facts as to defendants' intent is enough to prevent the defendants from being cloaked with *Noerr* immunity as a matter of law." (App. p. A-18)

[7] Clipper tries to supplement the Court of Appeals' decision by arguing that it submitted a number of affidavits containing evidence of baselessness. (R.B. 13) However, those affidavits were submitted after summary judgment was entered and after the time for a motion to vacate the judgment had expired. (App. A, p. A-6) Thus, they were "late-filed" and the Court of Appeals expressly did not consider them. (App. A, p. A-10, n.13) In any

(Footnote continued on following page)

C. Access Denial.

Nor did the Court of Appeals agree with Clipper that this is a case like *Otter Tail* and *City of Lafayette*, where "the antitrust plaintiff did not need ... access to obtain prior approval from a regulatory body." (R.B. 15) To the contrary, the Court of Appeals stated: "The ICC also retains power to suspend any new rate sua sponte ...." (App. A, p. A-3). Thus, the Court of Appeals acknowledged that even if RMMTB had not protested Tariff 55—which both Clipper and the ICC described as "novel and experimental"—"there is no certainty the rate would have been approved." (App. A, p. A-42)

The Court of Appeals could not properly have concluded otherwise. Clipper's assertion that it "merely had to publish its tariffs and they would have become effective automatically absent petitioners' sham protests" (R.B. 14), is dead wrong. The Interstate Commerce Act expressly gave the ICC the power to investigate and suspend rates "on its own initiative." (49 U.S.C. § 1006(e) recodified as 49 U.S.C. § 10708(a)), and during the years 1973-1977, for example, the ICC exercised that power over 250 times. (C.T. 2113-14) Thus, to use Clipper's words, this is a case where "the antitrust plaintiff needed prior access to obtain prior approval from a regulatory body—as in *Trucking Unlimited* ...." (R.B. 15) As Clipper admits, in such cases "the courts have followed that precedent and required some showing of 'access denial'." (R.B. 15)[8]

In short, the Court of Appeals held that petitioners' First Amendment right to protest was lost although (1) only one protest was involved; (2) the tariff protested was admittedly novel and experimental; (3) the protest's lack of success was the only objective evidence to support Clipper's allegation that

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(Footnote continued from preceding page)

event, the affidavits contained only conclusory allegations by paid witnesses arguing that RMMTB submitted false information to the ICC *after* the ICC began its investigation of Tariff 55.

[8] Indeed, the regulatory setting is in this sense exactly like the one in *Trucking Unlimited*. There, applications for operating authority could be granted without hearing or investigated and denied either upon protest or upon the initiative of the California Public Utilities Commission. (Calif. Pub. Utilities Code §§ 1063-64) However, as discussed in the Petition, access-barring or something akin to it has been required even where the antitrust plaintiff did not need access to obtain prior approval from a regulatory body. (Petition, p. 12, App. F, pp. F-59-F-63).

it was "baseless"; and (4) the protest did not bar anyone's access to the administrative process in circumstances where access-barring has been required.

Plainly, this holding is important to both the antitrust laws and the First Amendment. Just as plainly, this holding conflicts with decisions of this Court and other Courts of Appeals. Indeed, Clipper does not contend otherwise. Certiorari should be granted to review and reverse this holding.

III. The Court of Appeals' Decision On Clipper's "Fraud Claim" Is Important To The First Amendment And The Antitrust Laws And Conflicts With Decisions Of This Court And Other Courts Of Appeals

Third, Clipper argues that the issue presented by the Petition with respect to its "fraud" claim is likewise hypothetical. Clipper argues that the record showed that defendants filed "fraudulent protests" that "caused the ICC to investigate Tariff 55 . . . ." (R.B. 3, 16), and therefore that its claim satisfies the "*Walker Process* doctrine" and *Trucking Unlimited.* (R.B. 17-20)

Again, however, this is not how the Court of Appeals saw the case. Unlike Clipper, it did not suggest that there was any evidence that the ICC's investigation of Tariff 55 was caused by misrepresentations by defendants. To the contrary, it assumed that "the ICC began its investigation into Clipper's Tariff 55 *before* defendants made their fraudulent representations." (App. A, p. A-31, n.33).[9] It held that "the *Walker Process* doctrine" applied anyway:

> The doctrine is not concerned with whether the body intended to be influenced by the information is ultimately defrauded; a cause of action is established so long as the

[9] The Ninth Circuit speculated that the alleged "fraud may have resulted in a longer, more in depth, investigation," but it did not suggest that there was any evidence of this, and there was not. (App. A, p. A-31, n.33) The investigation lasted only six months; the two year period referred to by Clipper and the Ninth Circuit included the time for appeals. (Petition, pp. 4-5) *Neither the investigation nor the appeals prevented any of Clipper's rates from going into effect on schedule. (Id.)*

elements of an antitrust claim are alleged and the violation is executed through fraudulently supplying information. (App. A, p. A-33)

The Court of Appeals did not allude to any evidence that the ICC's investigation was caused by petitioners' alleged misrepresentations because there is none, and Clipper did not even claim there was until its Brief to this Court. (R.B. 3) Clipper's belated attempt to support and recast the Court of Appeals' holding to make it defensible is a meritless afterthought.[10] The Court of Appeals' holding is clear, and it cannot be wished away. That holding is inconsistent with both *Walker Process* and *Trucking Unlimited.*

In *Walker Process,* but for the defendant's misrepresentations the patent would not and could not have issued. (Petition, p. 16)[11] In *Trucking Unlimited,* the Court recognized that opponents in litigation frequently charge each other with fraud and therefore held that there must be an "illegal result" before the "sham" exception can be applied to vitiate *Noerr* immunity.

In *Trucking Unlimited* the Court also held that the First Amendment protects statements made in a legislative proceeding regardless of their character, and a long line of this Court's decisions squarely hold that ICC rate proceedings like the one involved here are legislative. (Petition, p. 16; see proposed Amicus Curiae Brief of American Trucking Associations, pp. 6-8) Thus, the Court of Appeals' assumption and Clipper's argument that the proceeding was adjudicatory (App. A, pp. A-30-A-31; R.B. 19) collide head-on with controlling rulings of this Court.

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[10] Indeed, as Clipper's request for judicial notice makes clear, the "evidence" on which Clipper relies is not even in the record (R.B. 4, n.2), and its arguments in this regard are absurd. They are based on a comparison of Clipper's "truckload" FAK rate applicable only to shipments exceeding 30,000 pounds with RMMTB's "truckload" shipments which varied from 10,000 to 40,000 pounds, and without even considering what commodities were involved—a classic comparison of apples and oranges. Moreover, they come down to the claim that RMMTB misrepresented common carrier charges—*i.e.,* rates—to the ICC, the very agency with which the tariffs containing those rates were filed.

[11] Clipper's statement that "the ICC's position in considering a protest is identical to that of the Patent Office in considering a patent application" (R.B. 18), ignores our demonstration that a patent proceeding is unique in its need for protection against fraud. (Petition, pp. 14-15)

Finally, the Court of Appeals' decision, which allows Clipper to get to trial on its fraud claim without even showing the "illegal result" required by this Court in *Trucking Unlimited,* is of critical importance to the antitrust laws and the First Amendment. As another Ninth Circuit panel has asked:

> [W]hat competitor, knowing that its participation in administrative proceedings might result in expensive and burdensome litigation, which would drag on through the discovery stage at least, would not thereby feel pressured to forego presenting its views to the government?

Franchise Realty Interstate Corp. v. *San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977). The answer is "no competitor." The chilling effect of the Court of Appeals' decision is undeniable. This court should review and reverse this decision.

IV. The Court of Appeal's Decision On The Keogh Doctrine Is Important To The Proper Roles of Antitrust Courts And Rate-Setting Agencies, As Well As To Proper Administration Of The Treble Damage Remedy, And It Conflicts With Decisions of This Court and Decisions From Other Circuits.

Finally, Clipper contends that this Court should not review the Court of Appeals' application of the *Keogh* doctrine because the doctrine only applies to "disputes between regulated industries and their customers", and because the Court of Appeals' decision in this regard is "insignificant." (R.B. 20-22) Clipper is wrong on both counts.[12]

To begin with, Clipper's view of *Keogh* was not the Court of Appeals' view. To the contrary, the Court of Appeals recognized that in *Keogh* this Court was not concerned only

[12] Clipper also suggests that this Court may have overruled *Keogh* in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966). (R.B. 20, n.18) There is nothing to this contention. *Carnation* did not address any damage issues at all, and did not so much as mention *Keogh.* However, if there were any question about *Keogh's* continued validity, that is a question this Court should address on the merits, by reviewing this case.

about preserving the uniformity of rates between customers of a regulated defendant; it was also concerned about allowing an antitrust court "to speculate on the level [at which] the rate would have been set by carriers and approved by the ICC absent the conspiracy, thereby assuming what ICC action would be." (App. A, p. A-41) Such speculation is implicated just as much by this litigation as by disputes between regulated industries and their customers, and the Court of Appeals did not pretend otherwise. Indeed, the Court of Appeals admitted that Clipper's principal damage claim did require precisely such speculation:

> Here the allegations indicate that Clipper would have filed an $842 rate, and the subsequent ICC approval *suggests* that rate *might* have been approved two years earlier. *Of course, there is no certainty the rate would have been approved. The speculation involved in the instant case,* however, in no way approaches the degree of speculation disallowed in *Keogh.* (App. A, pp. A-41-A-42)

Thus, by its own analysis, the Court of Appeals' decision conflicts with *Keogh.* Clipper simply has no answer to this problem.[13]

Indeed, Clipper's own brief establishes that the importance of the Ninth Circuit's holding regarding *Keogh* transcends this case. Clipper admits that *Keogh* has been rigorously applied

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[13] Furthermore, while the Court of Appeals did not acknowledge it, Clipper's only other damage claim of consequence likewise required speculation as to how the ICC would have acted in circumstances not presented to it. As the Court of Appeals stated, Clipper also sought "to recover for profits lost because of the 'cloud' on Clipper's rate while it was under investigation." (App. A, p. A-41) This claim presupposed that the ICC would not have investigated Clipper's "novel and experimental" rate, had it not been protested. Yet, as the Ninth Circuit elsewhere acknowledged, the ICC had the power to suspend any rate *sua sponte.* (App. A, p. A-3) Thus, this claim is based on the assumption that it would not have done so. Clipper's two claims that depended on speculation as to ICC action accounted for virtually all of Clipper's $30 million damage claim. Consequently, the Ninth Circuit's application of the *Keogh* doctrine was of substantial importance to this litigation.

Clipper's only other damage claim was "for the costs of defending against the protests." (App. A, p. A-41) However, Clipper admitted that this defense was conducted by its own Vice President-Traffic and that it involved only 72 hours of additional management time. (Stelzer Deposition at 183-189, 368, Ex. 1)

both by this Court and lower courts. (R.B. 21) It simply tries to distinguish those cases on the ground that they "involved disputes between regulated industries and their customers." *(Id.)* Since the Court of Appeals refused to accept that distinction, it is clear that there is a significant conflict between the Ninth Circuit's application of *Keogh* and the way it has been applied by this Court and other Circuits. This conflict is not dispelled by Clipper's claim that *some* cases from other Circuits support the Ninth Circuit's analysis. *(Id.)* That only underscores the significance of the conflict and the need for this Court to clarify the law.[14]

CONCLUSION

For the reasons stated here and in the Petition, the writ should be granted.

Respectfully submitted,

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February 11, 1983

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[14] Nor is the conflict dispelled by the line of cases that allow an antitrust plaintiff reasonable latitude in proving the *amount* of its damages. (R.B. 22) As this Court has stated:

> [T]here is a clear distinction between the measure of proof necessary to establish the *fact* of damage, and the measure of proof necessary to enable the jury to fix the *amount*. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong . . . ."

Story Parchment Co. v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) *See also MCI Communications Corp.* v *American Tel. & Tel. Co.*, 1982-83 Trade Cases ¶ 65,137 at p. 71, 415 (7th Cir. 1983).

MOTION FILED
JAN 12 1983

No. 82-1110

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,
Petitioner,

v.

CLIPPER EXXPRESS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Trucking Associations, Inc. (ATA) moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

ATA is the national trade association of the trucking industry, representing all types of motor carriers of property. ATA, and the numerous motor carriers and state motor carrier associations it represents, are continuously involved in administrative proceedings before federal and

state agencies, as well as judicial review of such proceedings.

ATA, on behalf of itself, its affiliated state associations and its member carriers, is vitally interested in the constitutional issues involved in this action.[1] Further, ATA is concerned with the continued ability of itself and the carriers it represents to continue to participate in the regulatory framework of the Interstate Commerce Act without fear of retaliatory actions in the form of civil antitrust suits.

The decision rendered by the Court of Appeals for the Ninth Circuit raises the spectre of treble damage liability for motor carriers and their associations for even the most routine and benign participation in the administrative process. Indeed, the decision appears to eliminate First Amendment protection for an administrative protest simply because it is eventually unsuccessful. The chilling effect of the decision on the exercise by ATA, its affiliated associations and the carriers they represent is of concern to the entire motor carrier industry.

ATA submits that its participation will provide an additional perspective that may be valuable to the Court in this case.[2] Furthermore, the granting of this motion will not cause any harm or prejudice to any party.

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[1] The Court has recognized that associations such as ATA "perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission." *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246, 247 (1962) (per curiam). ATA received permission to appear and filed an *amicus curiae* brief in support of the petition for rehearing in the Court of Appeals. ATA has also appeared and filed on previous occasions *amicus curiae* briefs on behalf of the regulated motor carrier industry in proceedings before this Court; *e.g., Southern Pacific Transportation Co. v. Commercial Metal Co.*, —— U.S. ——, 102 S. Ct. 1815 (1982).

[2] Counsel for respondents has denied ATA's request for written consent to participate as amicus in this appeal.

CONCLUSION

Accordingly, this Motion for Leave to File Brief Amicus Curiae in Support of Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January, 1983

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---

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is the national trade association of the trucking industry, representing all types of carriers of motor freight. ATA and the numerous motor carriers it represents are continuously involved in administrative proceedings before federal and state agencies. Therefore ATA, on behalf of itself, its affiliated associations and its member carriers,

is vitally interested in the constitutional issues involved in this action.[1] The decision rendered by the Court of Appeals for the Ninth Circuit raises the spectre of treble damage liability for even the most routine and benign participation in the administrative process. Indeed, the decision appears to eliminate First Amendment protection for an administrative protest simply because it is eventually unsuccessful. That will surely chill the exercise of the right to petition by ATA and the carriers it represents.

ARGUMENT

The basic question presented by this case is under what circumstances a use of the legal process may be a violation of the antitrust law. Or, where does the First Amendment right to petition end and treble damages liability begin? The Court of Appeals' answer to the question would result in potential antitrust liability where it has never existed before. The lower court's decision will also inhibit exercise of the right to petition, especially where exercise of the right would affect competition. The volume of such petitioning activity is enormous. Much of it is legislative in nature, occurring in arenas where lively, unrestricted debate is most important.

I. THE VOLUME OF THE AFFECTED PROCEEDINGS

This case arises out of a motor carrier's protest of a competitor's rate which must be approved by the Interstate Commerce Commission (ICC). This kind of peti-

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[1] The Court has recognized that associations such as ATA "perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission." *National Motor Freight Traffic Ass'n. v. United States*, 372 U.S. 246, 247 (1962) (per curiam). ATA received permission to appear and filed an *amicus curiae* brief in support of the petition for rehearing in the Court of Appeals.

tioning activity involves a great number of proceedings and all such proceedings would be affected by the Court of Appeals' decision. There are currently more than 24,000 motor carriers of freight regulated by the ICC. Each must obtain an ICC certificate to provide service subject to the ICC's jurisdiction (49 U.S.C. § 10921), and each must file its rates and have the ICC approve such rates. 49 U.S.C. §§ 10761-62. In 1981, motor carriers of freight filed 467,373 rate applications and more than 20,000 operating rights applications with the ICC.[2] All of those filings were subject to protest by interested parties, especially competitors. 49 U.S.C. §§ 10708, 10922.

The Interstate Commerce Commission has quite recently acknowledged the importance of individual proceedings on rate matters before it. *Lawfulness of Vol. Discount Rates Mot. Com. Car.*, 365 I.C.C. 711, 716 (1982). In that proceeding the ICC stated its unqualified support for the consideration of proposed rates on an individual basis pursuant to the procedures contained in Chapters 107 and 111 of Title 49 of the United States Code. *Id.* In fact, the ICC there declined to initiate a proceeding to develop guidelines on the lawfulness of discount rates in favor of such individual proceedings.

The right to protest rate filings is an essential and integral part of this entire process of ensuring lawful and reasonable rates for the transportation of freight by truck. The chilling effect of the Ninth Circuit's decision on the rights of motor carriers to participate in such proceedings will obstruct implementation of a principal element of the national transportation policy, mandated by Congress, 49 U.S.C. § 10101(a), to be implemented by the ICC.

Moreover, ICC rate and operating authority proceedings, numerous as they are, make up only a fraction of

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[2] ICC 1981 Annual Report, Appendix B, Tables 1 and 7.

the situations that bring motor carriers into conflict with competitors before administrative agencies. Motor carriers are constantly involved in rulemaking and formal and informal administrative proceedings before the ICC on all aspects of their business.[3] Furthermore, they are subject to similar regulation on all these matters by numerous state regulatory agencies. Thus, beyond the 467,373 motor carrier rate proceedings and the 20,000 operating authority proceedings before the ICC in 1981, there were cumulatively hundreds of thousands of additional proceedings before the agencies in those states that regulate intrastate rates and practices similar to the federal system.[4] Participation in all such proceedings by interested competitors is greatly influenced by this Court's interpretation of their First Amendment rights.

Participation in state and federal administrative proceedings is a business and competitive necessity. Thus, motor carriers need to know when such participation will expose them to treble damages. In view of the inability of the courts of appeals to agree on an answer to that question,[5] it is clearly up to this Court to tell them.

ATA is concerned primarily with the problems which the uncertainties in the law cause for motor carriers. But the thousands of other businesses whose right to op-

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[3] *See* generally any recent ICC Annual Report, especially Appendix B, which lists the "Commission Workload."

[4] *See, e.g.*, Calif. Pub. Utilities Code §§ 455, 487-88, 491, 520; Haw. Rev. Stats. §§ 271-20(e), 271-21(e), 271-22(a), (c), 271-32(b); Kans. Stats. Ann. §§ 66-113, 66-117(a)-(c); Vermont Stats. Ann. §§ 223-224. The only states that do not have some form of economic regulation of transportation are Maine, Florida, Arizona, New Jersey and Wisconsin.

[5] The conflicts between the various courts of appeals over the proper scope of the "sham" exception to the *Noerr-Pennington* doctrine are set forth in the Petition For Certiorari at pages 10-12 and Appendix F to the Petition.

erate in a particular area or in a particular way or at a particular price depends on the approval (or acquiesence) of a regulatory body confront the same problems. Thus, as for motor carriers, applications, protests and contested administrative proceedings are part of the normal competitive arena for all industries subject to regulation by agencies such as the Federal Communications Commission, Federal Maritime Commission, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and numerous other federal, state and local agencies.

The activities that require participation before one or another of these agencies cover an extremely broad range. For example, antitrust litigation based on charges that the participation was "sham" may arise out of virtually any of the seemingly limitless number and variety of license and permit applications required to conduct business.[6] And, of course, the "sham" antitrust theory is

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[6] *See, e.g., Alexander v. National Farmers Organization*, 1982 CCH Trade Cases § 64,914 at p. 72, 654 (8th Cir. 1982) (U.S. Dept. of Agriculture milk marketing qualification); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440 (E.D.PA 1966) (pipe specifications); *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 112 F. Supp. 676 (E.D.MO 1953) (import controls); *B.A.M. Liquors v. Satenstein*, 1976-2 CCH Trade Cases § 60,997 (S.D.N.Y. 1976) (liquor licenses); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (building permits); *Kurek v. Pleasure Driveway and Park Dist. of Peoria*, 557 F.2d 580 (7th Cir. 1977) *vacated and remanded*, 435 U.S. 992 (1978), *on remand*, 583 F.2d 378 (7th Cir. 1978) *cert. denied*, 439 U.S. 1090 (1979) (concessions); *Aloha Airlines v. Hawaiian Airlines*, 349 F. Supp. 1064 (D.HI 1972), *aff'd*, 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974) (subsidies); *Baker Driveway Co. v. Bankhead Enterprises*, 478 F. Supp. 857 (E.D.MI 1979) (patents); *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163 (E.D. MO 1976) (charter).

not limited to the administrative setting. Any litigation or use of the legal process may and does give rise to the same kinds of charges by competitors.[7]

In sum, participation by competitors in the legal and administrative processes is pervasive and essential to our economic and governmental systems. It is thus for good reason that the right to use these processes is guaranteed by the First Amendment. The exercise of that right must not be inhibited by fear of treble damages liability or uncertainty in the law. Yet that is just what the Ninth Circuit's decision does. This Court should review that decision.

II. THE NATURE OF THE AFFECTED PROCEEDINGS

This Court should review the Ninth Circuit's decision not only because of the *volume* of proceedings and petitioning activities it affects, but also because of the *nature* of those proceedings and activities. The Ninth Circuit's decision imposes requirements of caution and delicacy in the legislative arena where debate is and should be bold and robust.

The Ninth Circuit acknowledges that the so-called "*Walker-Process* doctrine" of antitrust liability for fraud in an agency proceeding must be limited to misrepresentations made in an *adjudicatory* proceeding. 674 F.2d at 1271. The Ninth Circuit then *assumes*, without discussion or citation of authority, that the ICC rate proceeding involved in this case was "adjudicatory." That assumption is contrary to explicit decisions of this Court, and it destroys the important distinction between the adjudicatory and legislative arenas.

This Court has repeatedly held, over a span of 75 years, that "the function of rate-making is purely legislative in its character, and this is true, whether it is exercised

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[7] *See*, for example, *Vendo Co. v. Lektro-Vend Corp.*, 433 U.C. 623 (1977).

directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated." *City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 8 (1909).[8] As the Court, Justice Holmes, explained in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1980):

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. . . ."

The same conclusion applies where, as in this case and countless other similar ICC proceedings, the agency investigates a rate to determine whether it is lawful. The Court has specifically addressed this point in *Louisville and Nashville RR. v. Garrett*, 231 U.S. 298, 307 (1913):

> "The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to 'hear such statements, arguments or evidence offered by the parties' as it may deem relevant; and, it is in case it determines that the carrier is 'guilty of extortion' that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character . . .

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[8] *Accord, Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 386 (1931); *Baer Brothers Mercantile Co. v. Denver & Rio Grande RR.*, 233 U.S. 479 (1913).

> the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. . . . It is 'the nature of the final act' that determines 'the nature of the previous inquiry.' "

It makes good sense to conclude that an administrative rate proceeding is legislative, not adjudicatory. Rate proceedings involve broad questions of policy and philosophy on which opposing parties can *reasonably* hold conflicting views: Are the rates reasonable? Do they constitute unfair or destructive competitive practices? Are they unreasonably discriminatory? *See, e.g.*, 49 U.S.C. §§ 10101, 10701, 10708 and 10741.

The ICC rate proceeding involved here is a good example. The freight-all-kinds tariff Clipper Exxpress filed was a radical departure from established policy that it is generally unfair to charge the same rate for hauling very dissimilar commodities. *See Merchandise to and from Chicago*, 66 M.C.C. 287, 293 (1956). Clipper Exxpress even labeled its own tariff "experimental." The ICC's resolution of the dispute over that tariff was a legislative policy judgment, not an adjudication of particular facts. The debate on the question was free-swinging, but that is as it should be. All parties had a full and fair chance to argue their positions, and the ICC made a judgment that the new tariff was a lawful experiment. The process worked as it should work.

Thus, the Ninth Circuit's assumption that the rate proceeding was "adjudicatory" is contrary both to this Court's decision and to the realities of rate regulation. The result is that the Ninth Circuit's decision makes the chilling risk of treble damages the price for joining in the rough and tumble of debate that is basically political and legislative. This Court should review the decision and avert this threat to the First Amendment.

CONCLUSION

The Ninth Circuit decision below will chill the exercise of the right to petition the government. The decision affects a truly staggering number of administrative and judicial proceedings. It also intrudes on the legislative process. This Court should grant a writ of certiorari to review the Ninth Circuit's decision.

Respectfully submitted,

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